

Memo. of cases in re implied negative covenant:

13 Corpus Juris pg. 1104

232 Fed. 609, 613

232 Fed. 240, Affirmed 239 Fed. 109

248 Fed. 944, 947

247 Fed. 822, 827

8 Wall. 276, 288

High on Injunctions,
4th Ed., Sec. 1151A



(27,117)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 370.

J. HARTLEY MANNERS, PETITIONER,

vs.

OLIVER MOROSCO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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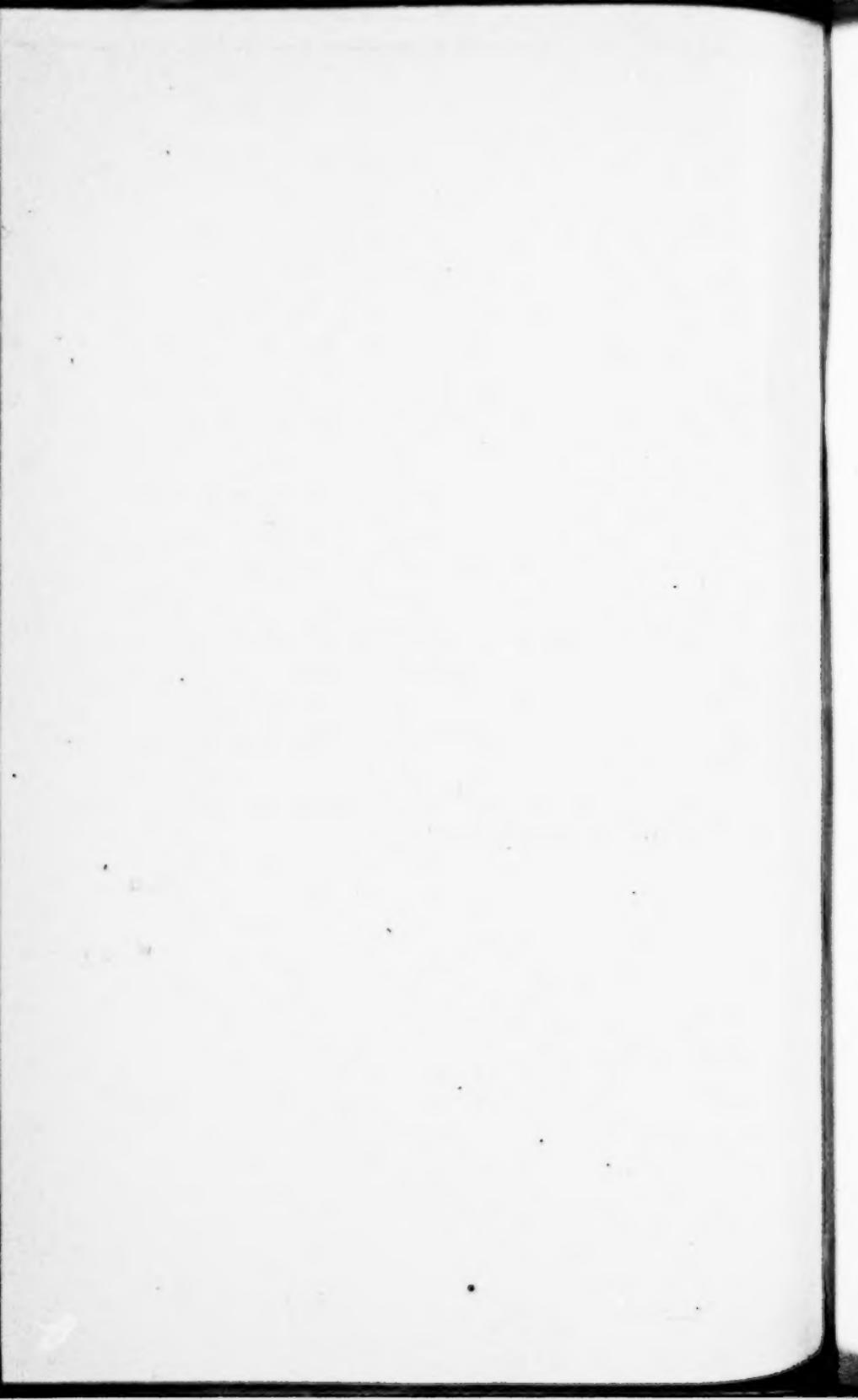
United States Circuit Court of Appeals for the Second Circuit.

J. HARTLEY MANNERS, Plaintiff-Appellant,
against
OLIVER MOROSCO, Defendant-Appellee.

**Appeal from the District Court of the United States for the Southern
District of New York.**

TRANSCRIPT OF RECORD.

**United States Circuit Court of Appeals, Second Circuit. Filed
Jan. 18, 1919. William Parkin, Clerk.**



Subpoena.

1

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
TO OLIVER MOROSCO GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by J. Hartley Manners and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of TWO HUNDRED ² AND FIFTY DOLLARS (\$250).

WITNESS, Honorable LEARNED HAND, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 26th day of August in the year one thousand nine hundred and eighteen and of the Independence of the United States of America the one hundred and forty-third

ALEX. GILCHRIST JR.

Clerk.

DAVID GERBER

Compl'ts Sol'r.

3

The defendant is required to file his answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken *pro confesso*.

ALEX GILCHRIST JR.

Clerk.

[SEAL]

Bill of Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,

AGAINST

OLIVER MOROSCO,
Defendant.

TO THE HONORABLE, THE JUDGES OF THE DISTRICT
COURT OF THE UNITED STATES, FOR THE SOUTH-
ERN DISTRICT OF NEW YORK:

J. Hartley Manners, a subject of the United Kingdom of Great Britain and Ireland, domiciled in the Borough of Manhattan, City of New York, State of New York, within the Southern District of New York, brings this, his bill of complaint, against Oliver Morosco, a citizen of the State of California, and thereupon your complainant shows unto your Honors:

FOR A FIRST CAUSE OF ACTION.

FIRST: That your complainant is and at all the times hereinafter mentioned was a subject of the United Kingdom of Great Britain and Ireland.

SECOND: That the defendant, Oliver Morosco, at all the times hereinafter mentioned was and now is a citizen of the State of California, having an office and place of business for the transaction of business in person in the Borough of Manhattan,

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City of New York, State of New York, within the 7
Southern District of New York, in which City and
District said defendant is to be found.

THIRD: That your complainant is by profession
an author and dramatist.

That the complainant originated and wrote a
dramatic composition to which he gave the title
of "Peg O' My Heart". That the said play was
original with your orator, and was not taken,
copied or adapted from any other play, story,
book or publication, and the title thereof "Peg O'
My Heart" was original with your orator, and 8
had not theretofore been used as the title of any
other play, dramatic composition, story or book,
and the said play and the title thereof were the
original conception and invention of your com-
plainant.

FOURTH: That on or about the 16th day of July,
1918, your complainant, being the author, owner
and proprietor of the said dramatic composition
"Peg O' My Heart", and the same never having
before been printed or published in this or any
foreign country (except in form of a novel, and as
hereinafter set forth), and the same being a work 9
copyrightable under the Copyright Laws of the
United States, and your orator being then domi-
ciled within the United States, to wit, being domi-
ciled in the City of New York, State of New York,
within the Southern District of New York, did se-
cure copyright of the said dramatic composition
"Peg O' My Heart", by publishing the same and
offering the same for sale to the general public in
the United States, with the following notice of
copyright inscribed and affixed upon the first page
of each copy thereof, published or offered for sale

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10 in the United States, to wit, "Copyright, 1918, by J. Hartley Manners".

That the said notice of copyright was and has been affixed upon the first page of each copy of said dramatic composition published or offered for sale in the United States.

FIFTH: That thereafter, and on or about the 19th day of July, 1918, complainant duly registered his claim to copyright with the Register of Copyrights, Washington, District of Columbia, and did on the 18th day of July, 1918, deposit in the mail within the United States, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition of the said dramatic composition "Peg O' My Heart" then published, together with a written claim to copyright therein and thereto; and accompanied by an affidavit under the official seal of an officer authorized to administer oaths within the United States, duly made by the printer who printed the book, setting forth that the copies deposited had been printed from type set within the limits of the United States, and from plates made therein and that the binding of the said book had been performed

11 within the limits of the United States. That such affidavit also stated the place where and the establishment in which such type were set and plates were made and binding was performed and the date of the completion of the printing of said book and the date of publication. That the facts stated in said affidavit were true.

12

That the said two complete copies of the best edition of the said work so deposited in the mail as aforesaid were printed from type set within the limits of the United States, and from plates made within said limits of the United States, and were

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bound within said limits of the United States. 13
 That thereupon the Register of Copyrights issued unto your complainant a certificate of copyright registration of said dramatic composition. That annexed hereto, marked "Exhibit 1" is a copy of the certificate of the Register of Copyrights, Washington, District of Columbia, showing that two copies of said work were duly deposited in the Copyright Office, as hereinbefore alleged, together with an affidavit prescribed by section 16 of the Act entitled "An Act to Amend and Consolidate the Acts respecting Copyrights", and that registration of the claim to copyright was duly made by your complainant; that a copy of said copyrighted work is deposited with the Clerk of this Court on the filing of this bill, and complainant begs leave to produce the same upon the hearing or trial of this action, or any motion made in the course of this suit. 14

SIXTH: Your orator further shows that at the times herein mentioned, Dodd, Mead and Company was and is a domestic corporation, and was and is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the Borough of Manhattan, City of New York, Southern District of New York, and now is and for many years past, and at the times hereinafter mentioned was, engaged in the business of publishing books. 15

SEVENTH: That heretofore, and on or about the 30th day of October, 1913, the said Dodd, Mead and Company, being then a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place

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16 of business in the Borough of Manhattan, City of New York, and within said Southern District of New York, and the said play "Peg O' My Heart" having never before been printed or published in this or any foreign country, did with the consent and by authority of your complainant, print and publish, in the form of a novel or story, the said play "Peg O' My Heart", and did offer the same for sale to the general public in the United States, with the following notice prescribed and affixed upon the first page of each copy of said book, to wit, "Copyright, 1913, by Dodd, Mead and Company". That the said notice of copyright was and has been affixed upon the first page of each copy of the said book published or offered for sale in the United States.

17 EIGHTH: That thereafter and on or about the 4th day of November, 1913, the said Dodd, Mead and Company duly registered its claim to copyright with the Register of Copyrights, at Washington, District of Columbia, and did on said 4th day of November, 1913, deposit in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition of the said book, "Peg O' My Heart" then published, together with a written claim to copyright therein and thereto, accompanied by an affidavit under the official seal of an officer authorized to administer oaths within the United States, duly made by the printer who printed the book, setting forth that the copies deposited had been printed from type set within the limits of the United States and from plates made within the limits of the United States, and that the binding of the said book was performed within the limits of the United States, which affidavit stated the place where and

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the establishment in which such type was set and 19
plates made and binding performed, and the date
of the completion of the printing of the book and
the date of publication thereof. That the facts
stated in the said affidavit were true. That there-
upon the Register of Copyrights issued to said
Dodd, Mead and Company a certificate of copy-
right registration of the said book. That annexed
hereto, marked "Exhibit 2" is a copy of the certifi-
cate of the Register of Copyrights, Washington,
District of Columbia, showing that two copies of
said book were duly deposited in the Copyright
Office on the 4th day of November, 1913, together
with said affidavit hereinbefore referred to, and
that the registration of copyright was duly made
upon the said day. That a copy of said copyrighted
book is deposited with the Clerk of this Court on
the filing of the bill of complaint, and your com-
plainant begs leave to produce the same upon the
hearing or trial of this action, or any motion made
in the course of this suit. 20

NINTH: That said Dodd, Mead and Company did
assign and execute to your orator an assignment
of the sole and exclusive right to translate the said
copyrighted work into other languages or dialects,
and to make any other version thereof; also the 21
exclusive right to dramatize said copyrighted
work; also the exclusive right to perform or repre-
sent said copyrighted work publicly in any manner
and by any method by which said copyrighted work
may be exhibited, performed, represented, produced
or reproduced, and the exclusive photo-play and
motion picture rights and the right to exhibit, per-
form, represent, produce or reproduce the said
copyrighted work, or any dramatization thereof, by
means of motion pictures, and to authorize and

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22 license others so to do, with the right to print, publish, copyright and vend any of said translations, dramatizations, photo-play or motion pictures, or any serialization of the copyrighted work, during the term of said copyright, or any renewal thereof.

TENTH: That said assignment was duly recorded in the Copyright Office on January 15, 1917, in Book 67, pages 188-189. That annexed hereto, marked "Exhibit 3" is a copy of the said assignment with a certificate of the Register of Copyrights of the due and proper recording of the said assignment in the Copyright Office.

23 **ELEVENTH:** That the said dramatic composition "Peg O' My Heart" has been performed upon the stage in the various cities of the United States, with great success and profit. That the said dramatic composition was played in New York City, at the Cort Theatre, continuously from December 20, 1912, until May 30, 1914, covering a period of seventy-four consecutive weeks, playing to gross receipts of \$750,860, or at an average of over \$10,000 a week. That the principal part of the said dramatic composition is the character known as "Peg O' My Heart", which was played

24 by your complainant's wife, who is professionally known upon the stage as Laurette Taylor. That various dramatic companies performed the said play in the various cities of the United States, and there was taken in from performances given of the said play in excess of \$3,500,000 and royalties have been paid to your complainant from the performances of the said dramatic composition, amounting to \$214,540.29.

TWELFTH: That the rights of your complainant in and to the said dramatic composition have been

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respected and recognized until the doing of the 25
wrongful acts by the defendant, herein complained
of.

THIRTEENTH: Your orator further complains
and says that the said dramatic composition readily
lends itself to a stage representation and perform-
ance of the same by means of motion pictures, and
that the said dramatic composition, as a photo-play
performance and representation upon the stage, by
means of motion pictures, is exceedingly valuable,
and your complainant has been offered large sums
for the right to produce and represent upon the 26
stage the said dramatic composition, by means of
motion pictures as a photo-play.

FOURTEENTH: That a motion picture perform-
ance of a dramatic composition is given with
scenery and costumes, by a company of actors
before a high-speed camera, and thereupon from
the negative films there are printed positive films,
which positive films are exhibited upon a screen
by means of a projecting machine, in theatres and
places of entertainment, to which the audience is
invited for a specified price of admission, the
prices varying according to the location of the 27
seats. That the story told by this method is the
same story as told when the play is performed
by living actors and actresses, and told in the
same order and sequence. That performances
of motion pictures or photo-plays are given in
theatres throughout the United States, for which
an admission is charged, and the public is invited
to witness a stage performance and representa-
tion by means of motion pictures or as a photo play
of the play advertised or announced for perform-
ance; that large revenues are derived from motion

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28 picture performances and stage representations of photo-plays, and in the various cities of the United States there are motion picture theatres devoted exclusively to stage performances and representations of photo-plays. That one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same and authorize others to perform and represent the same as a photo-play or by means of motion pictures, and as hereinbefore stated, the right to present and authorize others to present said dramatic composition, "Peg O' My Heart", as a motion picture or photo-play, possessed by your complainant, is of great value.

29

FIFTEENTH: Your complainant further shows that the defendant, Oliver Morosco, has threatened and intends to, and has publicly announced that he will produce and represent and authorize others to produce and represent upon the stage said dramatic composition, "Peg O' My Heart," as a motion picture photo-play, under said title, "Peg O' My Heart," and has notified complainant that he intends to represent and perform, and authorize others to represent and perform, as a motion picture photo-play, complainant's dramatic composition, "Peg O' My Heart," in motion picture theatres, under said title, within the Southern District of New York, and elsewhere throughout the United States, without the consent, license or permission of complainant, and against his protest.

30

SIXTEENTH: Your complainant further shows that if the said defendant is permitted and allowed to give and authorize others to give mo-

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tion picture performances of the said dramatic composition, "Peg O' My Heart", without the consent, license, authority or permission of your complainant, and continues to advertise his intention to produce and license others to produce the play as a photo-play or by means of motion pictures, it will irreparably injure the value of complainant's rights in and to the said dramatic composition and the right to produce and represent the same upon the stage as a photo-play or by means of motion pictures, and will break down the exclusive right which complainant has in and to said dramatic composition, and in and to the exclusive right to perform and represent the same and authorize others to perform and represent the same as a photo-play, or by means of motion pictures, or otherwise, and break down and destroy the exclusive right which complainant has to represent and authorize others to represent the said play "Peg O' My Heart" upon the stage.

SEVENTEENTH: That the acts of the defendant in publicly announcing in the public press and otherwise that he will produce and represent, and license others to produce and represent the said dramatic composition "Peg O' My Heart" as a photo-play and upon the stage, is causing great injury and damage to the business and profits of your complainant.

EIGHTEENTH: That theatrical managers and producers of motion pictures will not deal with one who has not the exclusive right to give and authorize the giving of motion pictures, nor will they pay the value of a motion picture right to one who is not the exclusive owner of such right

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34 in the play and cannot protect the theatrical manager or producer in such exclusive right to the performance, and the acts of the defendant hereinbefore referred to will lead theatrical managers and producers of motion pictures and purchasers of motion picture rights to refrain from continuing negotiations or dealing with your complainant for the right to produce said dramatic composition, "Peg O' My Heart", as a photo-play.

That the injury and damage caused by the wrongful acts of the defendant hereinbefore referred to cannot be accurately ascertained and

35 computed and adequate compensation therefor cannot be made in any action at law; that no damages recoverable in an action at law will afford complainant adequate relief, and the damages which may be suffered by the complainant are not capable of exact estimation or calculation, and are irreparable.

NINETEENTH: That the value to your complainant in the said dramatic composition consists in the fact that he has the exclusive right to produce and license others to produce the play upon the stage, and that he can be protected by the

36 Courts in such exclusive right, and if the defendant or any other person should represent the play as a photo-play or otherwise, without the consent, license or permission of your complainant, it will irreparably injure him in his business and rights, and he will suffer great and irreparable loss and pecuniary damage.

FOR A SECOND CAUSE OF ACTION:

TWENTIETH: The complainant hereby reiterates and reasserts each and every allegation set forth in paragraphs numbered "First," "Second,"

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"Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth," respectively, as though the allegations therein set forth were reiterated and again set forth at length. 37

TWENTY-FIRST: Your orator further alleges that the said dramatic composition "Peg O' My Heart" was written by your orator with a view to having the star part played by Laurette Taylor, who is the wife of your orator, and who, for purposes of designation, is herein referred to as Laurette Taylor, which is her stage or professional name; Miss Taylor being a well known and successful actress, playing and performing star or principal parts. 38

TWENTY-SECOND: That on or about the 19th day of January, 1912, your orator gave to the defendant a license to produce, perform and represent the said dramatic composition, "Peg O' My Heart," in manner and form as follows, to wit:

"**AGREEMENT** made and entered into this Nineteenth day of January, one thousand nine hundred and twelve, between J. HARTLEY MANNERS of the City, County and State of New York, party of the first part, and OLIVER MOROSCO, of the Burbank Theatre, Los Angeles, California, party of the second part. 39

WITNESSETH:

WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart' and

WHEREAS, the party of the second part wishes to obtain the exclusive right and li-

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40 cense to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW THEREFORE in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of One Dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows:

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

42 **SECOND:** The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of Five hundred (\$500.00) dollars upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged, and which sum shall be in advance of the royalties to accrue to the party of the first part under this agreement, and is not to be returned to the party of the second part under any circumstances whatsoever, but is to be credited as the payment of the first royalties as herein-

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after provided, if the said play shall be produced by the said party of the second part under this agreement. 43

THIRD: The party of the second part agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years.

FOURTH: The party of the second part further agrees to pay to the party of the first part not later than the first Wednesday following each and every week during which a performance of the said play shall have been given, further sums as royalties, as follows: 44

Five per cent. (5%) of the first four thousand five hundred (\$4500) dollars gross weekly receipts; seven and one half (7½) per cent on the next two thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent on all sums over that amount of six thousand five hundred (\$6,500) dollars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part. 45

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall im-

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46 mediateley revert to the said party of the first part.

SIXTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart' and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of 'Peg' for at least one season or longer if considered advisable by both parties to this agreement.

47

SEVENTH: No alterations, eliminations or additions to be made in the play without the approval of the author.

EIGHTH: The rehearsals and production of the play to be under the direction of the author.

48

NINTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

TENTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained.

ELEVENTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or cor-

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poration any of his aforesaid rights in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the play fail in New York City and on the road it is agreed between both parties it shall be released for stock. 49

TWELTH: Whenever the play is released for Stock the royalties received from the Stock Theatres to be divided equally between the party of the first part and the party of the second part.

THIRTEENTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators and successors. 50

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

In the presence of

.....

.....

51

J. HARTLEY MANNERS (L.S.)
OLIVER MOROSCO (L.S.)

It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart' as provided for in this contract, her successor in the role of 'Peg' for any subsequent tours shall be mutually agreeable to both parties to this contract.

**J. HARTLEY MANNERS,
OLIVER MOROSCO."**

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52 TWENTY-THIRD: That at the time of the granting of the said license, the said defendant had a theatre in Los Angeles, California, known as the Burbank Theatre, in which he gave productions of plays with a company of actors, for a short run.

That under and pursuant to said license, the defendant did perform the said play "Peg O' My Heart" at the said Burbank Theatre, Los Angeles, California, on the 28th day of May, 1912, and the play ran at said theatre for ten weeks. That the leading character, "Peg O' My Heart," in the said play was performed by Laurette Taylor, and the company of actors giving the performance was rehearsed by complainant. The play met with great success, and was brought to New York, and opened at the Cort Theatre, in the City of New York (Borough of Manhattan), where it ran continuously for a period of seventy-four weeks and two days with great success, the principal part being played by Laurette Taylor.

53 TWENTY-FOURTH: That because of the great success of the said play, which ran continuously at one theatre in the City of New York, to wit, the Cort Theatre, from December 20, 1912, to May 30, 1914,—making a total of 604 continuous performances—in order to secure, within the period of five years (the term of his contract) the profits to be derived from producing the play throughout the United States, which territory could not be covered by one company within the unexpired term of the license of the defendant (following the close of the performances at the Cort theatre in May, 1914), the license to defendant was, at his request, modified on or about the 20th day of July, 1914, so as to permit defendant to produce the said play with more than one company, in order that differ-

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ent companies may represent the play at the same 55 time in different parts of the country. That the agreement of July 20, 1914, modifying the said agreement of January 19, 1912, is as follows:

"WHEREAS J. Hartley Manners, of the City, County and State of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19th, 1912 (hereinafter called 'Original Agreement') a copy of which is hereto attached, and by express reference thereto made a part hereof; and controversies have arisen and now exist between the parties hereto with reference to the meaning of said Original Agreement, and the parties hereto desire to settle and adjust said controversies, and to change said Original agreement as hereinafter set forth;

NOW, THEREFORE, in consideration of the premises, and good and valuable consideration moving from each of the parties hereto to the other, the receipt whereof by the parties hereto is hereby respectively acknowledged, the parties hereto do hereby enter into this Supplemental Agreement:

FIRST: The parties hereto do hereby settle and adjust all of said controversies.

SECOND: Said Original Agreement, except as by this Supplemental Agreement changed, is hereby in all respects ratified, confirmed and approved.

THIRD: Paragraphs 'Sixth' and 'Eighth' of said Original Agreement, and also the ad-

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58 dendum or postscript to said Original Agreement (which addendum or postscript bears the signatures of said Manners and said Morosco) are each and all hereby cancelled and eliminated from said Original Agreement.

FOURTH: There shall be and there is hereby added to said Original Agreement, the following, to be designated as new paragraph 'Sixth' thereof:

59 'Said Morosco may, contemporaneously, and from time to time, as long as this contract is in force, produce, perform and represent said play 'Peg O' My Heart,' with or in as many companies in the United States and Canada as he, the said Morosco, may, in his sole discretion, deem proper; and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need not be engaged to appear and need not appear in the title role or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or members of the cast, the rehearsals, or production of said play by any of said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.'

60

FIFTH: There shall be, and there is hereby, added to said Original Agreement, to be known as new paragraph 'Sixth-a' the following:

'Said Morosco shall use reasonable efforts to direct that all advertising matter in the

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United States and Canada shall contain a 61 reference to the fact that said Laurette Taylor was the creator of the role of 'Peg' in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall 62 deem fit or proper.'

SIXTH: There shall be, and there is hereby, added to paragraph 'Fourth' of said Original Agreement, the following provision:

'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of 'Peg O' My Heart' in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement.'

SEVENTH: It is further agreed that paragraph 'Eleventh' of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:

ELEVENTH: Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agree-

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64 ment or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement.'

65 EIGHTH: It is further agreed that paragraph 'Twelfth' of said Original Agreement shall be and the same is hereby amended, so as to read as follows:

66 'TWELFTH: Said play 'Peg O' My Heart' may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.'

NINTH: It is further agreed that during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission, privilege or right

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to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit the said play by cinematograph or motion or moving pictures in the United States 68 or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement, to the same extent and with the same effect as though this Supplemental Agreement had not been entered into. This provision is not to be construed as a recognition by either party hereto that the other had, under the Original Agreement, or has, under this Agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play. 69

TENTH: The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said Original Agreement, on the part of either of the parties hereto, prior to the execution of this Supplemental Agreement;

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70 provided, however, that said Morosco shall and will pay to said J Hartley Manners, on or before July 31st, 1914, any and all unpaid royalties which said J Hartley Manners shall be entitled to receive from said Morosco under said Original Agreement and this Supplemental Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in original duplicate, at the City of New York, this 20th day of July, 1914.

71 J. HARTLEY MANNERS (Seal)
OLIVER MOROSCO (Seal)"

TWENTY-FIFTH: That thereupon said Morosco organized eight different companies and performed the play with said theatrical companies playing in different parts of the United States and Canada, during the theatrical season of 1914-1915, giving 2,172 performances; in the theatrical season of 1915-1916, defendant had four different companies giving performances of the play in different parts of the country, representing the play 547 times; and in the theatrical season of 72 1916-1917, defendant had five different companies performing the play in different parts of the country, giving 888 performances. During said theatrical seasons of 1914-1915, 1915-1916 and 1916-1917, the said defendant sent out in all seventeen companies producing the play, and it was performed by said companies in practically every city of the United States in which the play could be performed with any prospect of profit to defendant. That the profits to defendant, derived from performances given, have been very large, amounting, as your orator alleges upon infor-

Bill of Complaint.

mation and belief, approximately to one million dollars. 73

TWENTY-SIXTH: That the term of the said contract with defendant and his license to produce said play has expired.

TWENTY-SEVENTH: Your orator further complains and avers that the said defendant, in violation of his said license, did give and authorize the giving, during the theatrical season of 1917-1918, performances of the said play "Peg O' My Heart", by a traveling stock company known as the Joseph W. Payton Repertoire Company. That the said Joseph W. Payton Repertoire Company is what is known in the theatrical profession as a traveling stock company producing plays released to stock theatres, and which said repertoire or stock company gave performances of the said play "Peg O' My Heart" in theatres in which the highest price for orchestra seats charged was fifty cents, and charging as low as ten cents for second balcony or gallery seats. That defendant did not pay complainant one-half of the royalties or compensation received by him from said performances given by said repertoire or stock company. That the profits 74 of the said Morosco during no one theatrical season were less than \$2,000. 75

TWENTY-EIGHTH: That the said defendant further violated and disregarded the terms of his said license in using and permitting to be used advertising and printed matter in connection with advertising the said play, without mentioning the name of your complainant as the author of the said play, as he was required to do by the terms of his said license.

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76 TWENTY-NINTH: Your orator further complains and avers that notwithstanding the premises, and the expiration of the term of the said license, and the violations and disregard of the rights of your orator, said defendant has notified your complainant that he intends to perform and represent, and authorize others to perform and represent upon the stage, the said dramatic composition "Peg O' My Heart" as a motion picture photoplay, under the said title, and authorize others to represent and perform the same as a motion picture photo-play under said title, within the Southern District of New York, and elsewhere throughout the United States, without the consent, license or permission of complainant, and against his protest.

77 THIRTIETH: Your orator further complains and says that the said dramatic composition readily lends itself to a stage representation and performance of the same by means of motion pictures, and that the said dramatic composition, as a photo-play performance and representation upon the stage, by means of motion pictures, is exceedingly valuable, and your complainant has been offered large sums for the right to produce and represent upon the stage, the said dramatic composition, by means of motion pictures or as a photo-play.

78 THIRTY-FIRST: That a motion picture performance of a dramatic composition is given with scenery and costumes, by a company of actors before a high-speed camera, and thereupon from the negative films there are printed positive films, which positive films are exhibited upon a screen by means of a projecting machine, in theatres and

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places of entertainment, to which the audience is invited for a specified price of admission, the prices varying according to the location of the seats. That the story told by this method is the same story as told when the play is performed by living actors and actresses, and told in the same order and sequence. That performances of motion pictures or photo-plays are given in theatres throughout the United States, for which an admission is charged, and the public is invited to witness a stage performance and representation by means of motion pictures or as a photo-play, of the play advertised or announced for performance; that large revenues are derived from motion picture performances and stage representations of photo-plays, and in the various cities of the United States there are motion picture theatres devoted exclusively to stage performances and representations of photo-plays. That one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same and authorize others to perform and represent the same as a photo-play or by means of motion pictures, and as hereinbefore stated, the right to present and authorize others to present said dramatic composition "Peg O' My Heart" as a motion picture or photo-play, possessed by your complainant, is of great value.

That at the time the said license was granted to the defendant in January, 1912, the manufacture of motion pictures was a well-known industry, and plays had been and were then being produced and performed by means of motion pictures or as photo-plays. The motion picture industry was well known to authors and producers of plays and managers and proprietors of theatres.

Bill of Complaint.

That at said time, in making contracts or granting licenses to produce a play, if it was intended to include the right to make a production by means of motion pictures, it was the custom in the theatrical profession to expressly mention motion picture rights, and it was also the custom to make special provision in respect of the royalties or payments to be made to the author or proprietor of a play or licensor for the motion picture rights, which royalties were entirely different from and computed upon a different basis than the royalties for the right or license to produce the play by living actors.

That the royalties paid to an author, proprietor or licensor for the right to produce the play by living actors was in January, 1912, and at the present time, is vastly different from the royalties that are paid in respect of the license or right to produce the same play by means of motion pictures in motion picture theatres. That in spoken drama, the producer of a play or licensee organizes his own company and furnishes the entertainment in theatres, and the gross receipts taken in are divided between the producer of the play and the proprietor or manager of the theatre in certain agreed proportions, depending upon the character of the attraction and the theatre and the city in which the theatre is located.

That in January, 1912, and since it has been the custom to fix an author's royalties, where the license is given to produce a play in spoken drama, by a certain percentage of the gross receipts taken in at the theatre where the play is being produced.

That in respect of the right to produce a play by means of motion pictures, there was in January, 1912, and is at the present time, a custom in the

Bill of Complaint.

theatrical profession to regulate the royalties paid to an author, proprietor or licensor on an entirely different basis than that of a spoken drama. That in the motion picture industry, the manufacturer of the picture, through a distributing agency, leases to motion picture theatres a positive film for the motion picture production, and the proprietor of the motion picture theatre pays a fixed sum for each day's use of the film, paying from five dollars to one hundred and fifty dollars a day, or more, for the use of the film. In theatres, in small cities, the charge may be five dollars a day, but in large cities and in larger theatres, the charge may be as high as one hundred and fifty dollars a day, or more, for the use of the film, for what is known as the "first-run" of the picture.

86

That with very few exceptions, the manufacturer of the film or distributing agency has no interest whatever in the receipts, and does not share in the receipts. That the usual arrangement made and which has been the custom, prior to and since January, 1912, is to pay the author, proprietor, or licensor, either an agreed sum for the motion picture rights of the play, or a fixed sum, together with a percentage of the profits made by the manufacturer of the picture, but not a royalty based upon the gross receipts taken in from each performance of the play at each theatre giving a motion picture performance, or using one of the positive films of the photo-play leased by the motion picture manufacturer or its distributing agency; nor does the theatre furnish to the motion picture manufacturer or licensor a box office statement of the receipts taken in at the theatre.

87

THIRTY-SECOND: Your complainant further shows that if the said defendant is permitted and al-

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88 lawed to give and authorize others to give motion picture performances of the said dramatic composition "Peg O' My Heart" without the consent, license, authority or permission of your complainant, and continues to advertise his intention to produce and license others to produce the play as a photo-play or by means of motion pictures, it will irreparably injure the value of complainant's right in and to the said dramatic composition "Peg O' My Heart" and the right to produce and represent and authorize others to produce and represent the same upon the stage as a photo-play or by means of motion pictures, and will break down the exclusive right which complainant has in and to said dramatic composition, and in and to the exclusive right to perform and represent the same and authorize others to perform and represent the same as a photo-play, or by means of motion pictures, or otherwise, and break down and destroy the exclusive right which complainant has to represent and authorize others to represent the said play "Peg O' My Heart" upon the stage.

89

90 **THIRTY-THIRD:** That the acts of the defendant in publicly announcing in the public press and otherwise that he will produce and represent, and license others to produce and represent the said dramatic composition "Peg O' My Heart" as a photo-play and upon the stage, is causing great injury and damage to the business and profits of your complainant.

THIRTY-FOURTH: That theatrical managers and producers of motion pictures will not deal with one who has not the exclusive right to give and authorize the giving of motion pictures, nor will they pay the value of a motion picture right to

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one who is not the exclusive owner of such right 91
 in the play and cannot protect the theatrical manager or producer in such exclusive right to the performance, and the acts of the defendant hereinbefore referred to have led theatrical managers and producers of motion pictures and purchasers of motion picture rights to refrain from continuing negotiations or dealing with your complainant for the right to produce said dramatic composition "Peg O' My Heart", as a photo-play.

That the injury and damage caused by the wrongful acts of the defendant hereinbefore referred to, cannot be accurately ascertained and 92
 computed, and adequate compensation therefor cannot be made in any action at law; that no damages recoverable in an action at law will afford complainant adequate relief, and the damages which may be suffered by the complainant are not capable of exact estimation or calculation and are irreparable.

THIRTY-FIFTH: That the value to your complainant in the said dramatic composition consists in the fact that he has the exclusive right to produce and license others to produce the play upon the stage, and that he can be protected by the courts in such exclusive right, and if the defendant or any other person should represent the play as a photo-play or otherwise, without the consent, license or permission of your complainant, it will irreparably injure him in his business and rights, and he will suffer great and irreparable loss and pecuniary damage. 93

All of which things and acts, doings and productions are contrary to equity and good conscience, and tend to the manifest wrong and injury to your orator.

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94 In consideration thereof, and inasmuch as your orator can only have relief in the premises in this Honorable Court, where matters of this nature are properly cognizable, complainant prays that the defendant be required to make true, fail and perfect answers to all and singular the matters hereinbefore stated and charged (but not under oath) as fully and particularly as if the same were here repeated, and that the defendant be decreed to render a full and true account to your complainant of all moneys and profits derived from or by reason of any performance given by him, or any of his licensees, in violation of the rights of your complainant, and that the defendant, his agents, servants, licensees and employees, and any and every person acting under his direction, control or permission, be restrained and enjoined, pending the action, and thereafter perpetually, from playing, producing, exhibiting upon the stage, printing, publishing, translating, copying, adapting, advertising, or causing or licensing to be produced, represented, played, exhibited, printed, published, translated, copied, adapted or advertised, or otherwise exercising or assuming to exercise or causing to be exercised, 95 or assuming any control, ownership or dominion of, in, to or over the dramatic composition or book entitled "Peg O' My Heart", or any of its scenes, incidents, plot, story or any simulation or colorable imitation or adaptation of the said dramatic composition or book, under the title of "Peg O' My Heart", or otherwise, and from representing or performing or authorizing others to represent or perform, or to advertise any play or dramatic composition under the said title of "Peg O' My Heart", and from manufacturing, making, advertising, exhibiting, performing or 96

Bill of Complaint.

representing or causing or authorizing to be manufactured, made, printed, advertised, exhibited, performed or represented, as a motion picture or photo-play the said dramatic composition or book entitled "Peg O' My Heart", or any of its scenes, incidents, plot or story, or any simulation, imitation or adaptation of the said dramatic composition or book under the said title of "Peg O' My Heart", or otherwise. 97

That the defendant be compelled, by a decree of this Honorable Court, to account to complainant for all infringing motion picture films made, manufactured or possessed by him, or at any time in his possession, or those of any of his licensees or assignees, and to account for and pay over unto complainant all such gains and profits as have accrued to or have been derived by or received by the defendant, and all such gains and profits as complainant would have received but for said wrongful acts and conduct of the defendant, and pay all damages that complainant has sustained, or in lieu of actual gains and profits, such damages as to this court may seem just and proper, pursuant to the Acts of Congress in such case made and provided. 98

And that, in order that your complainant may have such other relief as may be just, may it please your Honor to grant unto your complainant a writ of subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the said defendant, Oliver Morosco, commanding him on a day certain to be therein named, and under a certain penalty to be and appear in this Honorable Court and make answer to this bill of complaint, and to stand to and perform and abide by such further

Bill of Complaint.—“Exhibit 2.”

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“Exhibit 2.”

Copyright office of the Library of Congress
United States of America, Washington, D. C.

CERTIFICATE OF COPYRIGHT REGISTRATION

This is to Certify, (In conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913), that two copies of the BOOK named herein have been deposited in this Office under the provisions of the
107 Act of 1909, together with the affidavit prescribed in section 16 thereof; and that registratratration of a claim to copyright for the first term of twenty-eight years from the date of publication of said book has been duly made in the name of Dodd, Mead and Company, claimant of copyright, whose address is 443 Fourth Ave., New York, N. Y.; the title of the book registered is Peg O' My Heart. A comedy of youth. By J. Hartley Manners. This novel is founded by Mr. Manners on his play of the same title. Illustrations by Martin Justice. New York: Dodd, Mead and Company, 1913; the author is a citizen of United States; the date of publication is October 30, 1913; the date of the completion of printing is October 16, 1913; the affidavit was received November 4, 1913, and registration has been made as Class A, XXc., No. 358083.

108

(Seal) THORVALD SOLBERG,
Register of Copyrights.

Bill of Complaint.—“Exhibit 3.”

“Exhibit 3.”

109

WHEREAS, J. Hartley Manners composed, wrote and originated a play called “Peg O’ My Heart”, which play has been and is in manuscript form; and

WHEREAS, the said J. Hartley Manners (hereinafter called “Author”) did enter into an agreement on the 19th day of February, 1913, with Dodd, Mead & Company (hereinafter called “Publishers”), whereby the Author authorized the Publishers to publish, in novelized form, the said play “Peg O’ My Heart”; the said Author, however, reserving the rights of translation and of dramatization and serialization; and

110

WHEREAS, the said Publishers duly published in the United States a novelization of the play, under the said title “Peg O’ My Heart”, and did duly comply with the provisions of the United States Copyright Code of 1909, entitled “An Act to Amend and Consolidate the Acts respecting Copyrights”, and did duly comply with all the provisions of the said Act, with respect to the deposit of copies and registration of such work, and the giving of the notice of copyright, as provided in and by said Act, and in all other respects;

111

Now, THEREFORE, in consideration of the premises, and of the sum of one dollar, paid by the Author to the Publishers, receipt whereof is hereby acknowledged, the Publishers (Dodd, Mead & Company) do hereby sell, assign, transfer and set over unto the Author (J. Hartley Manners) for himself, his executors, administrators, heirs and assigns, the sole and exclusive right to translate the said copyrighted work into other languages or dialects, and to make any other version thereof; also the exclusive right to dramatize the said copyrighted work; also the exclusive right to perform or represent the copyrighted work publicly in any manner and by any method by which the said copy-

Bill of Complaint.—“Exhibit 3.”

112 righted work may be exhibited, performed, represented, produced or reproduced, and the exclusive photo-play and motion picture right and right to exhibit, perform, represent, produce or reproduce the said copyrighted work, or any dramatization thereof, by means of motion pictures, and to authorize and license others so to do, with the right to print, reprint, publish, copy and vend any of said translations, dramatizations, photo-play or motion picture, or the serializations of the said copyrighted work.

113 IN WITNESS WHEREOF, the said Publishers (Dodd, Mead & Company) have hereunto set their hands and seals, this 27th day of December, 1916.

DODD, MEAD & CO. INC.

(Seal) By EDW. H. DODD, President.

In presence of:

I. F. GRAHAM

342 W. 16th St.

MILES W. NOURSE

443 4th Ave.

N. Y. City.

114 UNITED STATES OF AMERICA, } ss.:
City, County & State of New York, }

On this 11th day of January, 1917, before me personally came EDW. H. DODD, to me known, who being by me duly sworn, did depose and say: That he resides in New York City; that he is the president of Dodd, Mead & Co. Inc., the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of its board of directors, and that he signed his name thereto by like order.

HENRY J. DAUSER,

(SEAL) Notary Public, Queens Co., N. Y.

Bill of Complaint.—“Exhibit 3.”

A. COPYRIGHT OFFICE OF THE UNITED STATES OF 115
AMERICA

LIBRARY OF CONGRESS—WASHINGTON

The foregoing assignment of copyright, dated December 27, 1916, and received for record in the Copyright Office on January 15, 1917, has been recorded in the Copyright Office, book 67, pages 188-189, in conformity with the laws of the United States respecting copyrights.

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this seventh day of February, 116
1917.

THORVALD SOLBERG,
Register of Copyrights.

(SEAL)

The Act of March 4, 1909, sec. 44, provides: “That every assignment of copyright shall be recorded in the Copyright Office within *three calendar months* after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

Answer.

UNITED STATES DISTRICT COURT,
 SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS, Plaintiff, AGAINST OLIVER MOROSCO, Defendant.	} Answer.
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OLIVER MOROSCO, a citizen of the United States of America, domiciled in the Borough of Manhattan, City of New York, State of New York, by his attorney, William Klein, answers the complaint of the plaintiff herein as follows:

AS TO THE FIRST CAUSE OF ACTION:

I. This defendant denies, upon information and belief, each and all of the allegations contained in paragraph First of the complaint herein.

120 II. As to each and all of the allegations in paragraphs Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth of the complaint contained, this defendant denies any knowledge or information thereof sufficient to form a belief.

III. As to the allegations of paragraph Twelfth of the complaint, this defendant denies that he has done or is doing any wrongful acts whatsoever, and denies that he plaintiff has any rights in the dramatic composition "Peg O' My Heart," other than such as have been reserved to him in the two

Answer.

agreements expressly set forth in paragraphs 121 Twenty-second and Twenty-fourth of the complaint herein.

IV. As to the allegations in paragraph Thirteenth of the complaint herein that the plaintiff has been offered large sums for the right to produce and represent upon the stage the said dramatic composition, "Peg O' My Heart," by means of motion pictures as a photo-play, this defendant denies any knowledge or information thereof sufficient to form a belief.

V. As to the allegations in paragraph Fourteenth of the complaint that one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same, and authorize others to perform and represent the same as a photo-play or by means of motion pictures, this defendant denies any knowledge or information thereof sufficient to form a belief. 122

VI. This defendant denies each and all of the allegations contained in paragraphs Sixteenth, Seventeenth, Eighteenth and Nineteenth. 123

AS TO THE SECOND CAUSE OF ACTION:

VII. With reference to the paragraphs of the complaint herein numbered First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth, this defendant now reiterates the admissions and denials with reference to the allegations of the said paragraphs heretofore alleged in connection with the first alleged cause of action in the said complaint.

Answer.

124 VIII. With reference to the allegations in paragraph Twenty-fourth of the complaint, this defendant denies that the modified agreement was made at his request. On the contrary, it was made for the mutual advantage of the plaintiff and the defendant. This defendant also denies that he was actuated in the making of such modified agreement by any desire to secure an opportunity to produce the said play throughout the United States of America within any period of five or other definite period of years, and denies that the term of the contract set forth in paragraph Twenty-second of the complaint is five or any other definite number of years. The defendant contends that by his said contract he had an absolute and unlimited grant of the rights to produce and represent the said play except as therein expressly limited.

125

IX. This defendant denies absolutely each and all of the allegations contained in paragraph Twenty-sixth of the complaint.

126

X. With reference to the allegations of paragraph Twenty-seventh of the complaint, the defendant admits that the profits of the play during no one theatrical season has been less than \$2,000, and admits that he did not pay the plaintiff one-half of the royalties paid to him by the Joseph W. Payton Repertoire Company, inasmuch as he was not required to do so by his contract with the plaintiff. As to each and all of the other allegations of paragraph Twenty-seventh of the complaint, this defendant denies the same.

XI. This defendant denies each and all of the allegations contained in paragraph Twenty-eighth of the complaint.

Answer.

XII. With reference to the allegations in paragraph Thirtieth of the complaint, that the plaintiff has been offered large sums for the right to produce and represent the said play upon the stage, this defendant denies any knowledge or information thereof sufficient to form a belief. 127

XIII. With reference to the allegations in paragraph Thirty-first to the effect that one of the most valuable assets possessed by an author or proprietor of a successful dramatic composition is the right to perform and represent the same, and to authorize others to perform and represent the same as a photo-play or by means of motion pictures, this defendant denies any knowledge or information thereof sufficient to form a belief. This defendant further denies the allegation in the said Thirty-first paragraph of the complaint that the plaintiff possesses or did possess at any time since the execution of the said contract set forth in paragraph Twenty-second of the complaint, the right to present or authorize others to present the said play in motion pictures. This defendant further denies the allegation in paragraph Thirty-first that in January, 1912, the manufacture of motion pictures was a well-known industry; and the allegation that at that time (or for that matter at any time since) in making contracts or granting licenses to produce a play, if it was intended to include the right to make a production by means of motion pictures, it was the custom in the theatrical profession to expressly mention motion picture rights; and the allegation that it was the custom to make special provision in respect of the royalties or payments to be made to the author or proprietor of a play or licensor for the motion picture rights. This defendant also denies, on information and belief, the al- 128 129

Answer.

130 legation in paragraph Thirty-first of the complaint that the royalties for motion picture rights were entirely different from and computed upon a different basis than the royalties for the right or license to produce the play by living actors, and that the royalties paid to an author, proprietor or licensor for the right to produce the play by living actors was, in January, 1912, and at the present time is, vastly different from the royalties that are paid in respect of the license or right to produce the same play by means of motion pictures in motion picture theatres. This defendant alleges that the matter of compensation in such cases is generally a matter of special agreement and depends upon the particular facts of each particular case. This defendant further denies, upon information and belief, the allegation in paragraph Thirty-first of the complaint, that in January, 1912, and since it has been the custom to fix an author's royalties, where the license is given to produce the play in spoken drama, by a certain percentage of the gross receipts taken in at the theatre where the play is being produced; and this defendant denies generally the allegations in the said paragraph concerning the alleged custom and practice for the regulation of the payment of royalties and the division of the receipts between author, producer and licensor.

131 132

This defendant further denies, on information and belief, each and all the following allegations in paragraph Thirty-first of the complaint:

That with very few exceptions, the manufacturer of the film or distributing agency has no interest whatever in the receipts, and does not share in the receipts. That the usual arrangement made and which has been the custom, prior to and since January, 1912, is to pay the author, proprietor, or licensor, either an agreed sum for the motion picture

Answer.

rights of the play, or a fixed sum together with a percentage of the profits made by the manufacturer of the picture, but not a royalty based upon the gross receipts taken in from each performance of the play at each theatre giving a motion picture performance, or using one of the positive films of the photo-play leased by the motion picture manufacturer or its distributing agency; nor does the theatre furnish to the motion picture manufacturer or licensor a box office statement of the receipts taken in at the theatre. 133

XIV. This defendant denies each and all of the allegations contained in paragraphs Thirty-two, 134 Thirty-three, Thirty-four and Thirty-five of the complaint.

FOR A SEPARATE AND AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES AS FOLLOWS:

XV. On or about the 19th day of January, 1912, the plaintiff and this defendant made a written contract, a copy of which is set forth in paragraph Twenty-second of the complaint.

XVI. On or about July 20, 1914, the plaintiff and the defendant modified the said contract by the execution of a supplemental contract, a copy of which is set forth in paragraph Twenty-fourth of the complaint. 135

XVII. The said contract of January 19, 1912, as modified by the said supplemental contract of July 20, 1914, is still in full force and effect; and this defendant has fully and duly performed all the conditions thereof on his part to be performed.

Answer.

136 XVIII. Since the execution of the said contracts, this defendant at all times has had and now has the sole and exclusive license and liberty to produce, perform and represent the said play, "Peg O' My Heart" in the United States of America and the Dominion of Canada, including the sole and exclusive license and liberty to produce and represent the same in motion picture or photo-play form.

137 XIX. The defendant has produced at least seventy-five performances of the said play during each and every theatrical season since December 20, 1912.

XX. Under the said contract and supplemental contract the only right which the plaintiff has to terminate the rights of the defendant thereunder is, as expressed in paragraph Fifth of the said contract of January 19, 1912, to wit:

138 "Fifth: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part."

Inasmuch as the defendant has in all respects complied with the condition of said paragraph, the plaintiff has not the right to maintain this action against the defendant.

Answer.

WHEREFORE, this defendant demands that the 139
complaint be dismissed with the costs and dis-
bursements of this action.

OLIVER MOROSCO
Defendant.

WILLIAM KLEIN,
Solicitor for Defendant,

CHARLES H. TUTTLE, Esq.,
Of Counsel.

STATE OF NEW YORK,) ss.:
County of New York,)

OLIVER MOROSCO, being duly sworn, deposes and 140
says: that he is the defendant in the above entitled
action; that he has read the foregoing answer and
knows the contents thereof, and that the same is
true to his own knowledge, except as to the matters
therein stated to be alleged on information and be-
lief and as to those matters he believes it to be true.

OLIVER MOROSCO.

Sworn to before me this 20th}
day of September, 1918. }

EMANUEL M. KLEIN

Notary Public,

[SEAL]

New York County.

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John Hartley Manners for Plff.—Direct.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

J. HARTLEY MANNERS,
Plaintiff
vs.
OLIVER MOROSCO,
Defendant

In Equity 15-214

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NEW YORK, Tuesday, November 19, 1918

Before—Hon. JULIUS M. MAYER,
District Judge

APPEARANCES:

W. C. NOYES, Esq., and
DAVID GERBER, Esq., For Plaintiff
WILLIAM KLEIN, Esq., and
CHARLES A. TUTTLE, Esq., For Defendant.

Plaintiff's Prima Facie Proofs.

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JOHN HARTLEY MANNERS, a witness called in behalf of the plaintiff, being duly sworn, testifies as follows:

DIRECT-EXAMINATION BY MR. GERBER:

Q. 1. Mr. Manners, you are a subject of Great Britain and Ireland? A. I am.

Q. 2. You have been a resident of the United States for how many years? A. Since December, 1902.

Q. 3. Residing here continuously from that date

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on? A. With the exception of sixteen months in 145
1914 and and 1915 I was in England.

Q. 4. Just paying a visit? A. I was producing
Peg O' My Heart.

Q. 5. You are a playwright? A. Yes.

Q. 6. What plays have you produced?

Mr. Tuttle: I object to that.

Objection sustained.

Mr. Gerber: Would it not be proper on the
question of his knowledge regarding the con-
dition of the motion picture industry in 1912?

The Court: I do not think so. 146

Exception by plaintiff.

Q. 7. Did you write "Peg O' My Heart"? A.
Yes.

Q. 8. That was an original production? A. It
was, yes.

Q. 9. I show you a printed copy of that dramatic
composition and ask you if that is the printed copy
of "Peg O' My Heart"? A. It is.

Mr. Gerber: I offer that in evidence.

Mr. Tuttle: I do not see, your Honor, the
object of inumbering the record with that.
The contents of the book is not a matter in issue
in any form, shape or manner, whether the play
is in English or French or any other language
is of no importance. 147

The Court: Suppose you concede the formal
facts.

Mr. Tuttle: I concede this is Mr. Manners
who wrote the play.

The Court: And also that the play was for
the purposes of this litigation duly and prop-
erly copyrighted?

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148 Mr. Tuttle: They copyrighted the book in 1918.

The Witness: The book was copyrighted in 1914.

Mr. Tuttle: There was another copyright in 1913 which was one year after the original contract was made. Now, the question is what has been granted to us? He may have copyrighted the play fifty times over before as well as after. If, however, he granted us certain rights the copyright matter has nothing to do with it.

149 The Court: Mr. Gerber just wants to make sure his jurisdiction is all right.

Mr. Gerber: That is all.

The Court: I will receive it.

Marked Plaintiff's Exhibit 1.

Mr. Gerber: I offer in evidence the certificate of copyright from the Register of Copyrights.

Marked Plaintiff's Exhibit 2.

I offer in evidence the certified copy of the application for registration dated July 18, 1918.

150 Marked Plaintiff's Exhibit 3.

Q. 10. I show you what purports to be a book of "Peg O' My Heart" and ask you if that is "Peg O' My Heart" in novelized form? A. It is.

Mr. Gerber: I offer that in evidence.

Mr. Tuttle: I renew my objection.

The Court: I do not see what this has got to do with it.

Mr. Gerber: For this reason, on the question largely of jurisdiction here. The book was copyrighted in 1913, and all the dramatic rights were reserved to Mr. Manners by the publisher.

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I do not say that it is essential for the jurisdiction of the Court, nor do I say it is essential on this contract, but I think it is part of the history of this case in order to show proper copyrights. 151

The Court: Objection sustained; it may be marked for identification.

Marked Plaintiff's Exhibit 4 for identification.

Exception by plaintiff.

Mr. Gerber: I offer in evidence the certificate of copyright of this book which has been 152 marked for identification.

Same objection, ruling and exception.

Marked Plaintiff's Exhibit 5 for identification.

Mr. Gerber: I offer in evidence assignment of Dodd, Mead & Company to J. Hartley Manners bearing date December 27, 1916, of all dramatic and motion picture rights covered by the copyright certificate marked Plaintiff's Exhibit 5 for identification.

Mr. Tuttle: Is that the assignment of the novelized form? 153

Mr. Gerber: Yes.

Mr. Tuttle: I make the same objection.

The Court: I make the same ruling.

Marked Plaintiff's Exhibit 6 for identification.

Exception by plaintiff.

Q. 11. I show you a paper purporting to be a contract bearing date January 19, 1912, between you and Oliver Morosco and ask you whether that bears

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154 your signature and that of Mr. Oliver Morosco?
A. Yes; it does.

Mr. Gerber: I offer the contract in evidence.

Marked Plaintiff's Exhibit 7.

Q. 12. I notice in this contract, Plaintiff's Exhibit 7, reference is made to one Miss Laurette Taylor playing the title role in "Peg O' My Heart". Who is Miss Taylor? A. My Wife.

Q. 13. She is an actress and has been for some years a star actress? A. She has.

155 Q. 14. I show you what purports to be a contract bearing date July 8, 1912, between Oliver Morosco and Laurette Taylor purporting to be witnessed by you, and ask you whether those signatures are the signatures of Oliver Morosco and Laurette Taylor? A. They are.

Mr. Gerber: I offer this contract in evidence.

Mr. Tuttle: I object to that contract. That contract is between other parties and it is not the subject matter of this suit.

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Mr. Gerber: This contract, if your Honor please, is a contract for three years with a right to extend for three years longer and would terminate exactly with the expiration of the contract Plaintiff's Exhibit 7, the first contract introduced.

The Court: I do not see that it has got anything to do with the case.

Mr. Noyes: If your Honor please, I would like to say a few words on that. This opens up quite an important question in the case and I think it ought to be presented to your Honor, and now may be as good a time as any time. It is perfectly true that this case depends upon the interpretation of these contracts which have been offered in evidence. The suit is for violation

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of a copyright. The defendant justifies under 157 his contracts. If his contracts give him the right to do the things we complain of why, that is a good defense. If they do not, why, it is a violation of the copyright. This case, as Mr. Tuttle said, does have two phases; first, we say as to whether the moving picture rights are granted, as to that matter I think that we would not have to go outside the precise terms of the contracts, which are very clear, and bring us, as we think, exactly within your Honor's decision in the Rex Beach case, that the language of the contract shows that it is limited to a 158 stage production just as clearly as if those words were expressly stated. The other question is whether at the present time Mr. Morosco has any rights under that contract at all and that is the question of whether it has expired or not. Now, that question whether it has expired or not has two phases; first, whether there is any time limitation at all, and secondly, if there is a time limitation, whether it has run out. Our contention is that this is not a grant at all, it is a mere license. Your Honor will notice the first paragraph, while it does use the word "grant" it says it grants a license, and it is a license, and nothing else. Now, the rule regarding a license is that it is revokable at the option of the licensor unless some time is specified, and if there were nothing else in the case we might rely on that elementary rule. However, the third paragraph says "The party of the second part agrees to produce the play not later than January 1, 1913" and to continue the play, and we say, and shall claim, I do not intend to argue at any length now, that that is a reciprocal provision, that 159

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160 the obligation to perform for five years gives the right to perform for five years, and that while we might have said that that was revocable at the option of the lessor yet in view of this provision where there is the time limitation for the duty to perform, that the right to perform is co-extensive. And the fifth provision which has been referred to, as to the minimum number of performances, we say it does not have the effect of having this run indefinitely, but just as to the number of performances required during the five year period.

161 Now, while we say, if your Honor please, that the intention is to be governed from the paper itself, while this limitation is to be found by reasonable interpretation in this instrument, yet it may be that it is a case that there is an ambiguity, that the language is uncertain about it so that your Honor would be required to go into the contemporaneous agreements, and we find that this calls for the employment of Miss Taylor as the star performer in the play, and we have a contract with Miss Taylor for three years plus two years more, or five years which has a bearing, we claim, upon the question of the limitation of time; Mr. Morosco claims there is no limitation of time at all. We say that this provision means a limitation of time. This contract provides for the employment of Miss Taylor, and we find the contract being made for Miss Taylor which runs over a five year period, and we think that it will be helpful to your Honor in case your Honor finds there is ambiguity here, and I have assumed that under the circumstances instead of your Honor ruling immediately as to the interpretation of that instrument that your Honor would

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receive this testimony and determine its bearing later on. 163

And there is also a question whether this contract, assuming it has a five year period, whether it ran out in 1918 or 1919. Paragraph 3 is subject to two interpretations. The other side claims that it is not only for the 1913-1914 season but for five years following that. We say the 1913-1914 season is to be calculated, or included, and that the word "thereafter" requires continuous performance. That Paragraph 3, it may be ambiguous and we intend to offer evidence to show the intention of the parties, the conversations, that it would run for five years expiring in June, 1918, and on that point the contemporaneous contract made with Mrs. Taylor which ran out in June, 1918 is important to be considered. It is the practical construction which the party himself, the defendant himself, put upon the instrument, as we say, that when he was to get the services of the star performer, that he employed her for five years, and we say that that indicates that the contract ran for five years.

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For that reason we intend to offer this testimony and offer other testimony on this. Of course, if we could consider this in an ideal way I suppose your Honor would say "I will consider this carefully, I will make my ruling as to the interpretation to be put upon this provision, if I find that the contract is perfectly clear and unambiguous one way or the other I will not receive it." But I do not suppose this morning with this very slight discussion your Honor could rule that way. It seems to me perfectly clear that the contract should be

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166 interpreted as we claim it and yet we must prepare.

The Court: I do not think the contract is ambiguous in the legal sense. In other words, I think the contract is in simple language, requires only the construction of the Court, and there are only here very few words of art. For instance, I would take testimony if it was a matter of any consequence upon what is meant by the words "theatrical season" concerning which I have no judicial knowledge, although both counsel said they agreed on that. The rest of it is purely the question of the construction of a written instrument which is, as I say, not ambiguous from my point of view in the legal sense. In the second place, on the question of construction of contract naturally I would take any testimony as to the transaction between Mr. Manners and Mr. Morosco, but the moment you go outside of that, I do not know what motives may have entered in the minds of Miss Taylor and Mr. Morosco, assuming Morosco to have construed the contract as meaning that he was obligated for five years, he made a contract with the star on those lines, which would not necessarily throw any light upon the relations between the defendant and the plaintiff. I will sustain the objection. The paper may be marked for identification.

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Mr. Gerber: Would it change your Honor's ruling if it appeared that one of the witnesses to the contract was Mr. Manners and one of the parties Morosco, so that you have the two parties to the contract,

The Court: No; not the slightest.

Marked Plaintiff's Exhibit 8 for identification.

Exception by plaintiff.

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By Mr. Gerber:

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Q. 13. Where were the terms of the contract, Plaintiff's Exhibit 7, discussed between you and Mr. Morosco?

Mr. Tuttle: I object to that.

Objection sustained.

Exception by plaintiff.

Q. 14. What if anything was said in discussing the terms of the contract about to be entered into resulting in the contract Plaintiff's Exhibit 7 respecting the term or duration of the license?

Same objection, ruling and exception.

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Mr. Noyes: Your Honor bears in mind on these two questions, first, as to the five year period, and secondly, as to when that five year period expired. Now, I am frank to say that it seems to me that that third paragraph is ambiguous on the question as to whether that five years is to include the season of 1913-1914 or not.

The Court: To me it is very simple, Judge. The season of 1913-1914 means from September, 1913 to June, 1914. Now, that having been completed, to wit, in June, 1914, you start your calculation of five years from that date because the contract here is perfectly plain when it says "and for each theatrical season thereafter". It means really under that clause that Morosco was obligated for six seasons beyond a shadow of a doubt in my judgment. Suppose the thing had read "Seventy-five performances during the month of September, 1913 and for each September thereafter". That is the same thing. Now, it is true with men quite characteristic of this profession that

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they do a lot of talking with each other and get all sorts of notions in their heads on which they subsequently never agree and the only safe way is to hold them down to the written words.

Mr. Noyes: But the other side claim practically that this runs for seven years.

Mr. Tuttle: No.

Mr. Noyes: You claim it was for part of the season of 1912-1913. You then claim it was for the season of 1913-1914 and then, as I understand it, you claim it is for five years after that, which makes seven seasons.

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Mr. Tuttle: Mr. Gerber himself said that the year 1913, January, 1913, down to the beginning of the season should be excluded because it was in the middle of the season of 1912-1913.

The Court: The point is that Morosco was to produce the play not later than January 1st. That is, for the performance of his obligation of production he could wait until the 1st of January.

Mr. Noyes: That is the preceding year.

The Court: It says the party of the second part agrees to produce the play not later than January 1, 1913.

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Mr. Noyes: That is the season of 1912-1913.

The Court: He had no obligation to produce any given number of performances until the season of 1913-1914.

Mr. Tuttle: That is the point.

The Court: Then he obligated himself to these seventy-five performances in the 1912-1913 season which might begin on January 1, 1913. There was no obligation, he could produce it once or one hundred times, but his fixed obligation was the minimum, began September,

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1913 for seasons 1913 to June, 1914 and then 175
it says "and for each theatrical season there-
after".

Mr. Noyes: Let me present this to your Honor, our view as to that provision, and which I think your Honor will see that there is at least an ambiguity there. We say that this calls for a presentation beginning not later than January 1, 1913. That is one year, one theatrical season or a part of it. It might have begun earlier but it could not be later. Then there was the seventy-five performances per year were required, and if your Honor will 176 transpose the words "for five years" to precede the words "at least" then it would read "to continue the said play for a period of five years for at least seventy-five performances during the season of 1913 for each theatrical season thereafter". We say that if that were the way it would be clear that the period in which these stipulated performances were to be given was a period of five years and that the word "thereafter" meant that those seasons should follow one after the other, that they should be continuous, and it was to prevent any possibility 177 of a claim that they would not be all within the five year period that we offer to produce testimony to show that that was the intention of the parties, and we also offer to show by this contract with Miss Taylor—

The Court: I appreciate the contention, I think, perfectly. My point is that there is no ambiguity from the legal sense any more than you can say that any contract, any written contract, which requires judicial construction in respect of plain language colloquated in a manner which would open an argument for

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178 each side, can be said to be ambiguous, because if such a doctrine were to obtain one would have parol testimony upon almost every contract that finds its way into a court. I will adhere to my decision.

Mr. Gerber: Exception.

Mr. Noyes: Your Honor puts the record in such shape that in case there should be an appeal the Circuit Court of Appeals would have it before them—

The Court: Yes, you have it marked for identification.

179 Mr. Noyes: And we offer to show, if your Honor please, that in conversations between these parties there was a parol understanding that the limitation of this contract should be for five years expiring at the end of the theatrical season of 1918.

Mr. Tuttle: I object to the offer.

The Court: For purposes of brevity counsel's offer may appear in the record.

Mr. Tuttle: I do not object to making the offer; I object to the materiality and substance of it.

180 The Court: I will state for the purposes of clarity on the record that if the witnesses were offered for that purpose I should exclude the testimony on the grounds heretofore stated.

Mr. Gerber: And we except.

The Court: Certainly.

By Mr. Gerber:

Q. 15. Mr. Manners, in this contract, Plaintiff's Exhibit 7, there is some reference to theatrical seasons. What is a theatrical season? A. It was customary to begin on October 1st and end on April 30th in the old days. For the last few years it has

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been extended to the end of May and sometimes 181 into June, but the accepted season would be October 1st to April 30th.

By the Court:

Q. 16. In 1912 what was the accepted season?
A. It would run into May, but as a rule the seasons closed April 30th.

By Mr. Gerber:

Q. 17. It would run from October of one year into the May of the following year? A. Yes.

Q. 18. Mr Manners, in July, 1914 there was a 182 meeting, was there not, between yourself and your counsel, and Mr. Morosco and his counsel, in Chicago? A. There was.

Q. 19. And a paper writing was then signed, was there not, which I will now show you. I will ask you whether that is the signature of Mr. Oliver Morosco? A. It is.

Q. 20. And that is the contract or paper that was signed in July, 1914 at Chicago? A. Yes; that is right.

Mr. Gerber: I offer that contract in evidence.

Marked Plaintiff's Exhibit 9.

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Q. 21. Who drew the contract, Plaintiff's Exhibit 7?

Mr. Tuttle: I object to that.

Objection sustained. Exception by plaintiff.

Q. 22. I show you another paper purporting to be a contract bearing date July 20, 1914 and ask you if that is Mr. Morosco's signature? A. Yes; it is.

Mr. Gerber: I offer that in evidence.

Mr. Tuttle: I object to that contract. That

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184 has reference to other rights in other places and includes also another play.

Mr. Gerber: It does include one play "Barbaraza" which they cancelled and it does include some other matters which they cancelled, but it embraces also "Peg O' My Heart" for England for a period of three years with an option of three years, made at the same time between the same parties, in July, 1914, in Chicago.

The Court: But the contract under discussion relates solely to the United States and Canada.

185 Mr. Gerber: Yes.

The Court: Objection sustained.

Exception by plaintiff.

Mr. Gerber: I offer it for identification.

Marked Plaintiff's Exhibit 10 for identification.

Q. 23. How long did "Peg" run in the city of New York? A. It ran from December 20, 1912, to May 30, 1914.

Q. 24. Continuously? A. Continuously.

186 Q. 25. Who played the star part? A. Laurette Taylor.

Q. 26. Following the execution of the agreement of July 20, 1914, how many companies were put out by Mr. Morosco playing this play?

Mr. Tuttle: It seems to me I ought to object to that.

Mr. Gerber: It would only go to sustain this question of limitation of time, that he was trying to cover the country with a number of companies.

The Court: Objection sustained.

Exception by plaintiff.

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Q. 27. Mr. Manners, in 1912 at the time that Plaintiff's Exhibit 7 was executed was the motion picture industry well known in the theatrical profession? A. Very well known.

Q. 28. And were there a number of motion picture theaters throughout the United States devoted exclusively to giving motion picture performances? A. Yes; there were.

Q. 29. In practically all the cities of the United States at that time, is that so? A. I should think so.

Q. 30. You had one of your plays in motion pictures, did you not? A. I did.

Q. 31. That is the "House Next Door"? A. "The House Next Door".

Q. 32. In leasing plays for motion pictures was it the custom in 1912 to lease at a fixed rental for the film for the use of it each night?

Mr. Tuttle: I object to that as immaterial and irrelevant, what the custom was in 1912.

Mr. Gerber: Here is a contract that probably would require this evidence in view of your Honor's decision in the other case, here is a contract that calls solely for a royalty basis on gross receipts of the house, and they ask your Honor to construe that to include motion pictures. Now, if in 1912 it was well known that pictures were leased for so much a night would it not have some bearing on the construction of the contract as to whether that does or does not embrace motion pictures?

The Court: I think not. Because many people lease motion picture rights upon a certain basis, that does not prove one way or the other that John Doe and Peter Smith could not arrange their own contract.

Mr. Noyes: If your Honor please, that is not

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190 quite the ground we are offering this upon. Here is a contract between these parties relating to the production of this play. We say that it is inapplicable, it does not apply to the moving picture industry. It speaks of there being a star. In the first place it is called a play. In the second place, it speaks of a star performer. In the third place, it speaks of the payment by royalties and it speaks of it being played after the play has a production in New York City, it will be considered played upon the road. It has a covenant that it will not be sublet or assigned. Now, for example, that is a very good illustration, the eleventh paragraph says that this manager will not lease, sublet, assign or sell any of his aforesaid rights in the said dramatic composition. Now, we propose to show that that is utterly inapplicable to the motion pictures because they do business by leasing and transferring and selling films. Now, in order to show that this is wholly inapplicable to motion pictures, we have got to show what the moving picture business is. We are not really showing what the custom of the moving picture business is, not as being a custom in the ordinary sense, but as being the manner in which the moving picture business is carried on, to show that this language is wholly inapplicable to it. So that we intend to show that in cases of moving pictures the film is made by a manufacturing company and the manufacturing company then lets the proprietors of State rights have it, and then it is sublet, down the line; that they paid so much a month, and it is not a case where gross receipts could be meant. It might be possible, of course, that in some particular case the

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whole method of the moving picture business should be revolutionized and they could make a contract of some sort on a gross receipt basis, but we want to show that this is not, cannot be considered to have been possible to refer to moving pictures because gross receipts is not a method in which the moving picture business is carried on. It is a question to see whether this gross receipts provision is fairly to be regarded as compatible with a grant of moving picture rights, and we say that according to the way the moving picture business is carried on in general that it is not. Now, of course your Honor cannot take, I do not suppose, judicial notice of the methods in which the moving picture business is carried on. I take it that any time when the question is whether a given contract would refer to a certain branch of industry, that you would take and consider the methods by which that branch of industry is carried on. We want to show the manner in which the moving picture business is carried on for the purpose of showing that this language is wholly inappropriate, and among them we offer to show that this provision concerning a portion of the gross receipts is utterly inapplicable because they never do such things in the moving picture business.

Mr. Tuttle: I think Judge Noyes has overlooked the provision that is also in the contract for the division equally of flat sums which are realized from production in stock. I believe it is in paragraph 12, which says that "Whenever the play is produced for stock the royalties received from stock theatres is to be divided equally between the party of the first part

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196 and the party of the second part". That is at folio 54.

I mention that simply to show that it is not quite correct to say that the standard of payment is a percentage on the gross receipts because the contract provides for two standard payments. My friend's argument would go very far to render impossible the exercise of many of the rights which are granted by this contract and the supplemental contract. For example, in the supplemental contract it expressly authorizes subletting, selling, transferring, without in any way limiting them as to the terms of payment by the transferee or the sublesee. Oliver Morosco could have assigned for flat sums. Is it to be assumed that if he did that he was not to pay anything to Manners? Not at all. My friends on the other side would be the first persons to contend that he should make a payment if he sublet or assigned for a flat sum, and of course, this provision for an equal division, 50-50, is the answer to any possible claim that a flat sum transfer is provided for in the contracts. But quite aside from all that, the parties here had made their contract in writing and they are now seeking to resort to custom, alleged custom, to vary the express terms which have been used, and the law applicable to that, if I may just read one sentence.

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Mr. Noyes: That is not my claim at all.

Mr. Tuttle: Custom is to be resorted to in the construction of contracts only in cases of doubt or ambiguity as to their meaning. Now, to meet Judge Noyes's other point, custom having been suggested by Mr. Gerber, in the case of *Frohman against Fitch*, we have this contract. This was set forth before Judge Hand,

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it was almost identical, and in that contract ¹⁹⁹ there was no provision for a 50-50 division of flat sums received, it was solely for gross receipts, and the only question was whether in a contract so expressed you could have motion picture rights included in it, and the Court held that it could be done on the strength of Mr. Gerber's brief, who was then on the other side of the proposition. He answered the points which he is now making in the following two sentences only which were sufficient to persuade the Court.

(Mr. Tuttle reads from brief.)

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In other words, gross weekly receipts was considered quite an applicable provision in that case but for some reason or other it is not considered applicable here.

The Court: I will sustain the objection but in order to have the point entirely clear should the case be reviewed, either Judge Noyes or Mr. Gerber may state what is intended to be proved.

Mr. Noyes: If your Honor please, I do not want to seem too persistent or to discuss matters that your Honor has ruled upon, but if my discussion gave your Honor the same impression that it gave Mr. Tuttle, then I wholly missed my point.

The Court: I understand the point. Your point is that you want to show that in 1912 when this contract was signed, the manner and method of conducting the motion picture business was such that these non-assignment and so forth clauses, and the gross receipts clause, could not possibly be applicable.

Mr. Noyes: Yes, that is it. We claim this,

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202 that the language of this contract in many particulars is wholly inapplicable and inappropriate to the motion picture industry as carried on at the time when this contract was entered into, and for the purpose of aiding your Honor in determining whether the parties had in mind that motion pictures were to be included in the contract. It seems to me, if your Honor please, your Honor in the Rex Beach case and in the Court of Appeals, in the court above, went into a discussion of the provisions of the contract. Those words "produce, perform and represent" which are in this contract Judge Hand in the Rex Beach case said were wholly inapplicable to grant of motion picture rights, that "produce, perform and represent" was inappropriate. Then there are a vast number of other decisions which obviously clearly show that it is confined to a play production.

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The Court: I think, as the point is important, I recognize this point, that under the rule I will take the testimony; that is, instead of excluding the testimony from the record I will take the testimony so that it may be preserved for the Court of Appeals. I should sustain the objection at present but I am entirely open to argument on a further consideration.

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Exception by plaintiff.

Mr. Noyes: Is it your Honor's impression at present that we should not be allowed to show the methods by which the motion picture business was carried on in 1912?

The Court: That is my impression, because I think really that the problem that is before the Court is to determine whether this is Frohman against Fitch or whether it is Klein

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against Beach, or somewhere in between. Now, 205 a fact has been established here which in Klein against Fitch I could only work out from the files of the court, to wit, that the motion picture business was known, as distinguished from the 1899 Ben Hur contract when it was not known. Now then, Mr. Manners and Mr. Morosco got together and signed a paper at a time when they both knew that the motion picture business was in existence, and so forth. The question is, before I come to the point you are after, if I were to look at the contract alone, may it be determined that they excluded motion 206 pictures because they did not mention it, or may it be determined that they included motion pictures because they made a broad grant in one of the clauses, or used language. I do not pass on whether it is a broad grant now, but the matter seems to be of importance to both sides, but my present impression is that with the motion picture business known, and also knowing that at any time methods of doing business may change, my present notion is that the testimony is not admissible, but it is a subject of serious argument and conscientious contention, and therefore I will take the testimony on the record with the statement that when I 207 listen to final argument I may not change my mind.

Mr. Noyes: With regard to the methods of carrying on the motion picture business, to go into it quite fully would take testimony not only through Mr. Manners but through other witnesses and your Honor would like to have it put in rather than an offer of proof.

Mr. Tuttle: I think your Honor made the ruling on the assumption that it would be a

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matter which could be readily presented on the record, but this is going to involve all sorts of questions of fact and intricacies because there are as many terms in motion pictures and styles of contracts as can well be conceived of.

The Court: I did say that on the theory that a few questions to Mr. Manners would expose the facts.

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Mr. Tuttle: In those cases which your Honor has referred to, and indeed in all the cases which can be found in the reports, I shall hand up my brief later, the Court has gone into this matter fully, but on the basis of the terms of the contract, and if there has been such an assumption as is now brought forward, the strangest thing in the world is that no Court nor counsel has ever discussed it until the present time.

The Court: I think the better way would be for me to follow my first feeling on the matter. I suggest that Judge Noyes state what it is that he offers to prove.

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Mr. Noyes: For the purpose of showing that the language of the contract in the provision relating to the payment of royalties based upon gross receipts is wholly inapplicable and inappropriate as applied to moving pictures, plaintiff offers to prove that the method by which the motion picture industry was carried on at the time of the execution of this contract, he proposes to show that as so carried on the manufacturer of moving pictures leases positive films to distributing agencies, and that the motion picture theatres paid a fixed sum for each day's use of the film, and in other ways to show that the nature of the motion picture

John Hartley Manners for Plff.—Direct.

industry was such that this provision for royalties based upon gross receipts was wholly inappropriate to use in respect thereto. ²¹¹

The Court: I will consider the testimony irrelevant and immaterial to the controversy; I will sustain the objection.

Exception by plaintiff.

Mr. Gerber: Your Honor does not sustain it on the ground that it is an offer?

The Court: No, and counsel for the defense makes on that point no objection that it is an offer. The offer is made for the purpose of brevity and when I said before that I would take the testimony I thought that a few words from Mr. Manners might bring out what Judge Noyes has said in the offer. ²¹²

By Mr. Gerber:

Q. 23. Mr. Manners, in 1912 there were what is known as stock theatres and stock companies, were there not? A. Yes.

Q. 24. Will you tell the Court what is known, or what was then known, as a stock company or stock theatre?

Mr. Tuttle: Might I ask what the purpose of that is? ²¹³

Mr. Gerber: The contract has reference to releasing it in stock and that is a technical word that I suppose I may explain to his Honor.

Mr. Tuttle: I do not want to be in the position of opening, or letting any doors be open, if your honor considers it important to be enlightened as to the meaning of the word "stock". It is not one of the issues in the case. It has not been produced in stock.

John Hartley Manners for Plff.—Direct.

214 The Court: I understand what "stock" means but at the same time it might come in somewhere in the case.

Mr. Noyes: Not only that it might come in, it comes directly into the case, as we claim that the language there is wholly inappropriate to the motion picture industry.

The Court: I understand your point; he may answer.

215 A. Stock theatres are theatres where they use plays after they have been played in New York and the metropolitan cities. They are played at a fixed royalty, and as a rule the author divides the royalties—

By the Court:

Q. 25. Spoken plays? A. Yes, sir; not motion pictures.

Mr. Tuttle: I think the part of the answer which said how the royalties are divided went beyond the question.

The Court: Yes, strike that out.

216 Q. 26. Now, in stock theatres, do they have a stock company, one company playing different plays? A. One playing as a rule.

Q. 27. The company remains at the theatre? A. Yes.

Q. 28. And a different play is produced each week? A. As a rule, yes.

Q. 29. What was a stock company in 1912 as distinguished from a stock theatre, a traveling stock company? A. A stock company, as I understood it then, was a repertoire company that would travel from city to city and play a piece a night, and they

John Hartley Manners for Plff.—Direct.

would only use the older plays that had been 217 already used up. They were known as stock repertoire companies.

Q. 30. Now, Mr. Manners, tell us what effect upon a play, in spoken drama, a motion picture performance has?

Mr. Tuttle: If you mean whether they compete one with the other I should not object to the question, but the question as it stands I think is entirely objectionable.

Q. 31. Does a motion picture performance compete with a performance of the same play in spoken 218 drama? A. I consider it to be a great handicap.

Q. 32. What are the usual prices charged in motion picture theatres for admission? A. As low as five cents.

Mr. Tuttle: I do not like to open any doors here; I am afraid, I am.

The Court: This line is produced, I assume, among other things, upon the point of injury?

Mr. Gerber: That is all.

The Court: Mr. Manners can simply answer what we do not judicially know, but actually know, and that is that the prices at the motion picture theatres are usually considerably lower than at the theatres where spoken plays are delivered. 219

The Witness: Yes, sir.

Q. 33. And what effect has a motion picture performance of a play upon the production of the same play in spoken drama in the same city? A. It would be a most serious handicap to have the same

John Hartley Manners for Plff.—Direct.

220 play done in pictures at 10 cents when you are presenting it at \$2 in the theatre.

Mr. Tuttle: We have nothing with this witness and may I inquire what more is there to the case. They have proved their contracts. We rely on the contracts, they rely on the contracts.

The Court: I think it is desirable for the purpose of the record if you feel so justified to state, as I assume you have in the Answer or somewhere, that it is your intention to produce the play in motion pictures.

221 Mr. Tuttle: I am willing to say that we claim the right to produce the play in motion pictures and that we intend to exercise that right.

Now, may I ask then, if my friends close the case. If they close their case we will rest.

222 Mr. Noyes: The only question that I have in mind is this, to be perfectly frank. I do not quite know since these new rules requiring the testimony to be incorporated in the record in case of appeal, whether an offer to prove, which I have done, is sufficient or whether we should have the testimony of some one skilled in the motion picture business to testify as to their methods, and if I were satisfied that the offer of proof were sufficient under the new equity rules, because under the new rules the case may go up on appeal to the Appellate Court, and the Appellate Court can pass on the question itself, and I have doubt in my mind whether the offer of proof is quite a sufficient compliance with that. If I thought all those questions were fully protected I think we could close.

Case.

The Court: I am almost certain. Quite a 223 number of cases have gone up from my court in which there have been these offers to prove. Perhaps, in order to be strictly technical it might be stated that Mr. Manners if offered would testify, that it is agreed by both sides for the purpose of this litigation that Mr. Manners would testify to the matters which counsel offered to prove.

Mr. Tuttle: I am willing to concede for the sake of brevity that Mr. Manners would testify in accordance with the offer of his counsel.

Mr. Gerber: That he would testify to the 224 facts.

Mr. Tuttle: Yes; that he would testify as facts in accordance with the offer of his counsel. I also call attention to the fact that I have not objected to the testimony on the ground that Mr. Manners is not qualified, that has not been the ground of my objection. I do not wish to concede anything I do not know about, but I have not objected to the offer of that kind, so it seems to me that covers that point.

The Court: You have objected solely on the ground of immateriality and irrelevancy of the 225 testimony.

Mr. Tuttle: Yes.

The Court: I think that is perfectly safe, Judge Noyes. Suppose it appears on the record, Mr. Tuttle and Mr. Klein, that no such point will be made in the Appellate Court.

Mr. Tuttle: About his qualifications?

The Court: No objection will be made in the Appellate Court to the fact that either the counsel has offered to prove or that Mr. Manners who is now on the stand has not at length

Case.

226 stated what counsel says he would have stated if asked.

Mr. Tuttle: I agree to that. Of course, your Honor will understand that in making this concession I do not concede the facts to be as Mr. Manners might testify and I would claim the right to cross-examine him before the matter be given any probative weight whatsoever.

227 The Court: That is the usual form. You do not concede that Mr. Manners's testimony would be correct in respect of the facts but you do concede that Mr. Manners if called would so testify?

Mr. Tuttle: Yes, sir.

Mr. Noyes: And the same is true both with respect to our offer of Miss Taylor's contract and the evidence which we offered along that line.

The Court: Yes; this applies to each offer contained in the record.

Plaintiff excepts to the exclusion by the court of the evidence which plaintiff offered, and to the court's ruling in sustaining the objection to the evidence.

228 Mr. Tuttle: I reserve not only the right to cross-examine Mr. Manners in case the offer should by any court be held acceptable, but also the right to bring witnesses to prove the contrary. I would want to reserve the right to call witnesses in rebuttal of any testimony that Mr. Manners might have given in accordance with the offer although I said he would have given the testimony in accordance with the offer.

The Court: Yes.

Mr. Gerber: How would that leave the rec-

Case.

ord, if counsel reserves the right to call wit- 229
nesses and reserves the right to introduce evidence. Is the case closed or is it not closed.

The Court: Yes; he is simply preserving that right in the event of appeal. Let me make this statement. Under the present equity rules of course the Circuit Court of Appeals has very wide powers in an equity case on review. Usually the Circuit Court of Appeals accommodates its decision to the facts as developed in the record and disposes of the matter without sending the case back to the District Court. There are, however, cases where justice requires that the cause be sent back to the District Court either for a new trial or additional testimony. My view in a case of this kind is this, that it unnecessarily encumbers the record and adds more to the expense of the litigants to take testimony on a point or proposition which I think is irrelevant to the issue. If I took Mr. Manners' testimony at length, his cross examination, and the testimony of such witness or witnesses as the defendant might produce for the purpose of contradicting Mr. Manners, I would, as I view it, permit an unnecessarily voluminous addition to the record. As the record now stands the points involved are clearly exposed by both sides and as I view the case the only questions involved are questions of law. Therefore, both the plaintiff and the defendant have added to the clearness by having a simple character of record, one by the offer and the other by reserving the right to call a witness or witnesses to contradict what Mr. Manners would have testified to in the event that the Circuit Court of Appeals should disagree with this Court on that point.

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231

Case.

232

I make this statement so that the fact that the plaintiff has put the matter in the form of an offer shall not in any manner deprive the plaintiff of his rights and the fact that the defendant in order not to encumber the record and unnecessarily prolong the trial has been willing to let the matter go as it is, may not in any manner be affected in his rights for undoubtedly the Circuit Court of Appeals will order either a new trial or testimony to be taken upon the excluded questions if that Court should find on this point that this Court was in error.

233

Mr. Noyes: If your Honor please, there is only one suggestion. I think Mr. Tuttle's statement should be that he reserves the right in the event of appeal. I think that should be added to it. The broad reservation of his right would be inconsistent with the closing of the case.

The Court: I understand that the rights are reserved merely to safeguard in case of appeal.

Mr. Tuttle: I presume that your Honor will not change your ruling.

234

The Court: I will not. On this point my ruling will remain the same.

Final Decree.

At a Trial Term of the United States 235
 District Court, for the Southern Dis-
 trict of New York, held in and for the
 said District, at the Court Room
 thereof, at 233 Broadway, Borough
 of Manhattan, New York City, on the
 9th day of December, 1918.

Present:

Hon. JULIUS M. MAYER,
District Judge.

J. HARTLEY MANNERS,
 Plaintiff,
 AGAINST
 OLIVER MOROSCO,
 Defendant.

} In Equity. 236
 15-214.

This cause having duly come on to be heard, and the allegations and proofs on the part of the plaintiff and the defendant having been heard and considered; and after hearing counsel for the respective parties, and due deliberation having been had thereon, and the memorandum of this Court's opinion having been filed,

237

Now, on motion of William Klein, solicitor for the defendant, Oliver Morosco, it is hereby

ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be, and it hereby is, dismissed upon the merits; that the rights granted in the paragraph designated "First" in the contract of January 19, 1912, are not limited in duration to the period of years or seasons specified in paragraph "Third" of the said contract, and include the motion picture rights to the play entitled "Peg O' My Heart"; that the defendant, Oliver Morosco, recover of the plaintiff his costs as taxed herein, in the sum of dollars (\$24.35), and that the said de-

Final Record.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Complainant,

vs.

OLIVER MOROSCO,
Defendant.

In Equity.
E15-214.

The complainant in the above entitled cause, filed his bill of complaint, a copy of which is hereunto annexed, on the 26th day of April, one thousand nine hundred and eighteen, and the writ of subpoena was thereupon issued, and returned personally served.

On September 24th, 1918, an answer to said bill of complaint was filed by William Klein, Esq., Solicitor, a copy of which is hereto annexed.

Testimony was thereafter taken by the respective parties.

Afterwards, and at the November term 1918 of said Court, present the Honorable Julius M. Mayer, Judge, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the 9th day of December, one thousand nine hundred and eighteen, a decree of said Court was filed and entered in favor of the defendant, by which it was adjudged that the bill of complaint herein be dismissed with costs, the same being hereto annexed.

Final Record.

And the costs having been taxed by the clerk at 241 Twenty-four & 35/100 (\$24.35) dollars, the process, pleadings, and decrees together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said Oliver Morosco recover of said J. Hartley Manners the sum of Twenty-four & 35/100 (\$24.35) dollars, costs as adjudged in said final decree.

Signed and enrolled this 13th day of December,
A. D. 1918.

ALEX. GILCHRIST, JR.
Clerk.

A True Copy

242

ALEX GILCHRIST, JR.
[SEAL] Clerk

243

Petition for Appeal.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,
AGAINST
OLIVER MOROSCO,
Defendant.

The above named plaintiff, J. HARTLEY MANNERS, conceiving himself aggrieved by the judgment or decree made and entered in the above entitled cause, on the 9th day of December, 1918, and the Final Record of December 13, 1918, does hereby appeal from said judgment and decree and Final Record to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors, which is filed herewith.

And the said J. HARTLEY MANNERS prays that he be allowed this appeal, and that a transcript of the record, papers and proceedings upon which said judgment or decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

Dated, New York, December 19th, 1918.

DAVID GERBER,
Solicitor for Plaintiff,
Office & P. O. Address: 32 Broadway,
Borough of Manhattan,
New York City.

Appeal allowed,
December 19, 1918.

LEARNED HAND,
District Judge.

Assignment of Errors.

247

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,
AGAINST
OLIVER MOROSCO,
Defendant.

248

Now comes the plaintiff, J. HARTLEY MANNERS, and files the following assignment of errors, upon which he will rely on his appeal from the judgment or decree in equity, entered herein on the 9th day of December, 1918, and the Final Record of December 13, 1918:

1. That the District Court of the United States, for the Southern District of New York, erred in failing and refusing to grant to the plaintiff the relief prayed for in his bill of complaint herein.

2. That the said court erred in dismissing the plaintiff's bill of complaint herein.

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3. That the said court erred in dismissing the plaintiff's bill of complaint, on the ground that the rights granted in paragraph designated "FIRST" of the contract of January 19, 1912, are not limited in duration to the period of years or seasons specified in paragraph "THIRD" of the said contract.

4. That the said court erred in dismissing the plaintiff's bill of complaint, on the ground that the rights granted in the contract of January 19, 1912,

Assignment of Errors.

250 included the motion picture rights to the play entitled "PEG O' MY HEART".

5. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the publication of the book "PEG O' MY HEART" in novelized form.

251 6. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, showing the registration for copyright of the book "PEG O' MY HEART" in novelized form.

7. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the assignment from Dodd, Mead & Company to plaintiff, bearing date December 27, 1916, of all dramatic and motion picture rights covered by the copyright of the book "PEG O' MY HEART" in novelized form.

252 8. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, as to the contract bearing date July 8, 1912, between Oliver Morosco and Laurette Taylor, which contract, among other things, employed the said Laurette Taylor to appear in "PEG O' MY HEART".

9. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the conversations between the plaintiff and the defendant, prior to and at the time of the entering into of the agreement between plaintiff and defendant (Plaintiff's Ex-

Assignment of Errors.

hibit No. 7), in respect of the term or duration of 253 the said agreement or license, and the circumstances under which the term or duration of the said agreement or license (Plaintiff's Exhibit No. 7) was fixed.

10. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, showing that there was a parol understanding between plaintiff and defendant, that the limitation of the contract (Plaintiff's Exhibit No. 7) should be for five years, expiring at the end of the theatrical season of 254 1918.

11. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, to show that the defendant prepared the contract (Plaintiff's Exhibit No. 7).

12. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff of the contract bearing date July 20, 1914, between the plaintiff and the defendant, respecting the production of the play "PEG O'MY HEART" in England, for a period of three years, with an option for three additional years, and which contract was marked "Exhibit 10" for identification. 255

13. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff, showing the number of theatrical companies put out by the defendant,

Assignment of Errors.

256 producing the play "PEG O' MY HEART", following the execution of the agreement of July 20, 1914, and showing the acts and conduct of the defendant following the execution of the said agreement of July 20, 1914.

14. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff to show, that in 1912, at the time of the execution of the contract, Plaintiff's Exhibit No. 7, the manner and method of conducting the motion picture business were such that the clauses and provisions of the contract (Plaintiff's Exhibit No. 7) were inapplicable and inappropriate to a license to produce the play "PEG O' MY HEART" in motion pictures.

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15. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff to prove the method by which the motion picture industry was carried on at the time of the execution of the contract, Plaintiff's Exhibit No. 7, and that at said time, such method was that the manufacturer of the motion picture of a play like "PEG O' MY HEART" leased the positive films through distributing agencies to motion picture theatres which paid a fixed sum for each day's use of the film.

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16. That the said court erred in sustaining the objection of the defendant and excluding the evidence offered by the plaintiff to show that the nature of the motion picture industry in 1912, when the license, Plaintiff's Exhibit No. 7, was given, was

Assignment of Errors.

such that the provision of the said contract, Plaintiff's Exhibit No. 7, for royalties based upon gross receipts, was wholly inappropriate to a license for use of the play for motion picture purposes. 259

Dated, New York, December 19th, 1918.

DAVID GERBER,
 Solicitor for Plaintiff,
 Office & P. O. Address: 32 Broadway,
 Borough of Manhattan,
 New York City.

To:—

WILLIAM KLEIN, Esq., 260
 Solicitor for Defendant,
 120 Broadway, New York City.

ALEX. GILCHRIST, JR., Esq.,
 Clerk of the District Court of the United
 States, For the Southern District of New
 York.

262

Citation on Appeal.

By the Honorable LEARNED HAND, One of the Judges of the DISTRICT COURT OF THE UNITED STATES, for the Southern District of New York, in the Second Circuit.

To OLIVER MOROSCO, GREETING:

263

YOU ARE HEREBY CITED and admonished to be and appear before a United States Circuit Court of Appeals, for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 18th day of January, 1919, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, for the Southern District of New York, wherein J. HARTLEY MANNERS is plaintiff-appellant, and you are defendant-appellee; and you are required to show cause, if any there be, why the judgment or decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

264

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 19th day of December, in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the United States the One Hundred and Forty-Third.

LEARNED HAND,
Judge of the District Court of the United States, for the Southern District of New York, in the Second Circuit.

Bond on Appeal.

265

NEW AMSTERDAM CASUALTY COMPANY59 John Street
New York.Equitable Bldg.
Baltimore, Md.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,
vs.
OLIVER MOROSCO,
Defendant.

Bond on Appeal.

266

KNOW ALL MEN BY THESE PRESENTS, That J. HARTLEY MANNERS, as Principal, and NEW AMSTERDAM CASUALTY COMPANY, a corporation organized under the Laws of the State of New York, with its principal office and place of business at No. 59 John Street, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the above named OLIVER MOROSCO, in the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250), to be paid to the said OLIVER MOROSCO, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. SEALED AND DATED THE 13TH DAY OF DECEMBER, 1918.

267

WHEREAS, the above named J. HARTLEY MANNERS has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the final decree rendered in the above en-

Bond on Appeal.

268 titled suit, by a Judge of the District Court of the United States for the Southern District of New York.

NOW THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the above named J. HARTLEY MANNERS shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

J. HARTLEY MANNERS [L. S.]
 NEW AMSTERDAM CASUALTY COMPANY
 269 By WILLIAM W. LAPORTE
 Resident Vice President.
 Attest: WILLIAM L. McGINTY
 Asst. Secretary.

STATE OF ILLINOIS, }
 County of Cook, } ss.:

270 On this 17th day of December, 1918, before me personally came the within named J. HARTLEY MANNERS, to me known, and known to me to be the individual described in and who executed the within bond, and he duly acknowledged that he executed the same.

ADA LOUISE KATZ, [SEAL.]
 Notary Public,
 My Commission expires Nov. 11, 1922.

STATE OF ILLINOIS, }
 Cook County, } ss.:

I, ROBERT M. SWEITZER, County Clerk of the County of Cook, DO HEREBY CERTIFY that I am the lawful custodian of the official records of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy, that

Bond on Appeal.

Ada Louisa Katz, whose name is subscribed to the proof of acknowledgement of the annexed instrument in writing, was, at the time of taking such proof of acknowledgement, a Notary Public in and for Cook County, duly commissioned, sworn and acting as such and authorized to take acknowledgments and proof of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, and to administer oaths; all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said Notary and verily believe that the signature to the said proof of acknowledgement is genuine. 271

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County, this 17 day of Dec. 1918.

[SEAL.] ROBERT M. SWEITZER, County Clerk.

Copies of Resolution of Board of Directors of the
NEW AMSTERDAM CASUALTY COMPANY

59 John Street Executive 7 St. Paul Street
New York, N. Y. Offices Baltimore, Md. 273

At a regular meeting of the Board of Directors of the New Amsterdam Casualty Company, duly called and held at the office of the Company in the Borough of Manhattan, City of New York, on the 11th day of October, 1916, a quorum being present, the following resolution was duly adopted:

"RESOLVED, That all bonds and undertakings, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, shall be signed by the President, any Vice-President or Resident Vice-President, and, duly attested by the

Bond on Appeal.

274 Secretary, any Assistant Secretary or Resident Assistant Secretary, and the Corporate Seal of the Company affixed thereto; "such instrument aforesaid may be signed by an Attorney-in-Fact, duly appointed and qualified, either individually or in conjunction with some other person or Attorney-in-Fact, as designated in his appointment, and the Corporate Seal of the Company affixed thereto."

275 I HEREBY CERTIFY, That the foregoing is a true and correct copy of the Resolution of the Board of Directors of the New Amsterdam Casualty Company, passed on the 11th day of October, 1916, at its regular meeting, at the office of the Company in the City of New York, and that said resolution is still in force.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Company this 13th day of December, 1918.

WILLIAM L. McGINTY,
Assistant Secretary.

276 At a regular meeting of the Board of Directors of the New Amsterdam Casualty Company called and held for the purpose of electing officers of said Company, at the Home Office of said Company in New York City, N. Y., on the 11th day of July, 1918, at which a quorum was present, the following were unanimously elected officers of said Company:

J. Arthur Nelson, President
Elmore B. Jeffery, Vice-President
Geo. C. Thomas, Vice-President
Thos. H. Fitchett, Vice-President
W. Irving Moss, Vice-President
J. D. Mahon, Vice-President
E. F. Dobson, Vice-President
T. L. Purdum, Vice-President

Bond on Appeal.

E. H. Brooks, Vice-President	277
Sifford Pearre, Secretary and Treasurer	
F. H. Strickland, Assistant Secretary and Assistant Treasurer	
E. G. Letzkus, Resident Vice-President	
Geo. W. Pesinger, Resident Vice-President	
H. T. E. Beardsley, Resident Vice-President	
Wm. W. LaPorte, Resident Vice-President	
E. G. Letzkus, Assistant Secretary	
Harry E. Garner, Assistant Secretary	
Wm. W. LaPorte, Assistant Secretary	
C. P. Brackett, Jr., Assistant Secretary	
Geo. W. Pesinger, Assistant Secretary	278
W. W. Hoblitzell, Jr., Assistant Secretary	
R. W. Gallon, Assistant Secretary	
J. H. Donaldson, Assistant Secretary.	
Chas. E. Bennett, Assistant Secretary.	
Wm. L. McGinty, Assistant Secretary.	

I hereby certify that the above is a true and correct list of the officers of the New Amsterdam Casualty Company, duly elected at the meeting of the Board of Directors of said Company, held on the 11th day of July, 1918, at which a quorum was present, and that said parties continue as officers at the present time.

279

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the Company this 13th day of December, 1918.

WILLIAM L. McGINTY,
Assistant Secretary.

Bond on Appeal.

280

Statement of the Financial Condition of the
NEW AMSTERDAM CASUALTY COMPANY
At close of business December 31, 1917.

CASH CAPITAL \$1,000,000.00
SURPLUS TO POLICYHOLDERS 1,250,595.95

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ASSETS	LIABILITIES
Stocks and Bonds..... \$2,118,147.60	Reserve for all Unde- termined Claims and Losses \$831,685.25
First Mortgage on Real Estate 92,000.00	Reserve for Reinsur- ance 1,219,300.65
Real Estate..... 142,300.96	Reserve for Accrued Commissions 111,031.53
Premiums in Course of Collection (less than 90 days overdue).... 661,722.46	Reserve for Taxes..... 45,000.00
Cash in Bank and Office. Deposited with Work- men's Compensation Reinsurance Bureau.. 469,560.41	Reserve for all other Liability 109,901.92
New York Excise Funds 54,078.87	Capital .. \$1,000,000.00
Miscellaneous Items.... 23,673.55	Surplus .. 250,595.95
	SURPLUS TO POLICY- HOLDERS 1,250,595.95
Total Assets..... \$3,567,515.30	Total Liabilities... \$3,567,515.30

I HEREBY CERTIFY, That the foregoing is a true
statement of the assets and liabilities of the said
Company as of December 31st, 1917, taken from
the books and records of said Company.

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IN TESTIMONY WHEREOF, I hereunto subscribe my
name and affix the seal of said Company this 13th
day of December 1918

WILLIAM L. McGINTY
Assistant Secretary.

Subscribed and sworn to be-
fore me this 13th day of
December 1918.

VERNON G. SWOPE
Notary Public.

New York Co. Clerk's No. 510
New York Co. Register No. 10393
My Commission Expires March 30, 1920

Bond on Appeal.

CITY OF NEW YORK
 State of New York
 County of New York

283

On this, the 13th day of December 1918 there personally appeared before me, a Notary Public in and for said City, County and State, WILLIAM W. LAPORTE residing in N. Y. C. and WILLIAM L. McGINTY residing in N. Y. C. to me known, who being by me duly sworn did depose and say that they reside as aforesaid; that they are the Resident Vice-President and Asst. Secy. respectively of the New Amsterdam Casualty Company described in and which executed the attached instrument; that they know the seal of the said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of said Corporation; that they signed their names thereto by like authority; that each is familiar with the handwriting of the other; and that the signatures subscribed to the attached instrument are genuine.

284

IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal in the City of New York in the State aforesaid, on the day and year first above written.

VERNON G. SWOPE
 Notary Public.

285

New York Co. Clerk's No. 510
 New York Co. Register No. 10393
 My Commission Expires March 30, 1920

(Endorsed)—United States District Court, Southern District of New York.—J. Hartley Manners, Plaintiff, *vs.* Oliver Morosco, Defendant.—Bond.—I hereby approve of the within bond and the sufficiency of Surety therein.—Name Learned Hand.—Date Dec. 19, 1918.—New Amsterdam Casualty Company.

286 **Stipulation as to Printing of Exhibits.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,
AGAINST
OLIVER MOROSCO,
Defendant.

287

IT IS STIPULATED by the solicitors for the respective parties that Plaintiff's Exhibit 1 and Plaintiff's Exhibit 4, for identification, each being a voluminous printed book, be not printed as part of the transcript of record herein, but that the originals of the said books, as marked respectively Exhibit 1 and Exhibit 4 for identification, shall be produced to the court at the time of the argument of the appeal.

Dated, New York, Jany. 6, 1919.

DAVID GERBER

Solicitor for Plaintiff.

288

WM. KLEIN

Solicitor for Defendant.

So Ordered.

January 6, 1918.

J. M. MAYER,

D. J.

Stipulation as to Rule 75.

289

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,
AGAINST
OLIVER MOROSCO,
Defendant.

290

The court consenting, it is stipulated by and between the parties hereto that in the appeal to be taken in this case, the requirements of Rule 75 will be waived, and the transcript of the record shall follow the stenographer's minutes and be in the form of question and answer, and not be reduced to narrative form.

Dated, New York, Jany. 6, 1919.

DAVID GERBER

Solicitor for Plaintiff.

WM. KLEIN

Solicitor for Defendant. 291

So Ordered.

N. Y., January 6, 1919.

J. M. MAYER,

U. S. D. J.

292

Stipulation as to Accuracy.

UNITED STATES DISTRICT COURT,
 SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
 Plaintiff,
 AGAINST
 OLIVER MOROSCO,
 Defendant.

293

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, January 6, 1919.

DAVID GERBER
 Solicitor for Plaintiff.
 WM. KLEIN
 Solicitor for Defendant.

Certificate of Clerk as to Accuracy. 295**UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

J. HARTLEY MANNERS,
Plaintiff,
AGAINST
OLIVER MOROSCO,
Defendant.

296

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter, as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of January, in the year of our Lord, one thousand nine hundred and nineteen, 297 and of the Independence of the said United States the one hundred and forty-fourth.

Clerk.

Plaintiff's Exhibit No. 2.**COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA**

LIBRARY OF CONGRESS—WASHINGTON

Certificate of Copyright Registration

299

THIS IS TO CERTIFY, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that TWO copies of the DRAMATIC COMPOSITION named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of J. Hartley Manners, 483 West End Ave., New York, N. Y.

Title of drama:

Peg O' My Heart.

By J. Hartley Manners, of Great Britain, domiciled in the United States, at New York, N. Y.

Date of publication July 16, 1918.

Copies received July 19, 1918.

Entry: Class D, XXc., No. 50013

THORVALD SOLBERG

Register of Copyrights.

300

[SEAL]

Plaintiff's Exhibit No. 3.

Write nothing here, but fill out each numbered space below	D1	2 c. rec'd	301
		Application rec'd	
		XXc.	

Leave all above these
words blank Fee rec'd \$

APPLICATION FOR COPYRIGHT—

**DRAMATIC COMPOSITION PUBLISHED IN
THE U. S.**

REGISTER OF COPYRIGHTS, Washington, D. C.

Date (1) **July 18, 1918.**

Of the DRAMATIC COMPOSITION named herein Two complete copies of the best edition published in the United States on the date stated herein are herewith deposited to secure copyright registration, according to the provisions of the Act of March 4, 1909. \$1 (statutory fee for registration and certificate) is also inclosed. The copyright is claimed by

Name and address of copyright

claimant (2) **J. HARTLEY MANNERS**

(Write name in full—State here citizenship of claimant)

(Subject of Great Britain & residing in United States.)

483 West End Ave. New York New York
(Street) (City) (State)

Name of Author, but if a translation,

then Translator (3) **J. HARTLEY MANNERS**

(Write name in full)

[Please turn this over]

Country of which the author

or translator is a citizen or

subject (4) United Kingdom of Great Britain
and Ireland [Must be stated]

Plaintiff's Exhibit No. 3.

304 An alien author domiciled in the United States must name the place of domicile
 (5) 483 West End Ave., New York City
 Brief title of work (6) Peg O' My Heart
 Exact date of first publication (7) July 16, 1918
 [State here the day, month, and year when the work was placed on sale, sold, or publicly distributed]
 Send certificate of registration to (8) J. HARTLEY MANNERS
 483 West End Avenue, New York New York
 (Street) (City) (State)
 Name and address of person sending
 305 the fee (9) J. HARTLEY MANNERS,
 483 West End Avenue, New York, New York.
 (Street) (City) (State)

If the work is a dramatic composition not reproduced for sale, use form D2; if a published dramatico-musical work, use form D3; if an unpublished dramatico-musical composition, use form D4.
 [Please turn this over]

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA, WASHINGTON, D. C.

I hereby certify that the foregoing is a true copy of the application as the same was received in this Office on the nineteenth day of July 1918, for the registration of the Dramatic Composition entitled
 306 Peg O' My Heart, entered in the name of J. Hartley Manners, 483 West End Avenue, New York, N. Y., copyright claimant.

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this twelfth day of November, 1918.

THORVALD SOLBERG,
 [SEAL] Register of Copyrights

Plaintiff's Exhibit No. 5 for Identification. 307

**COPYRIGHT OFFICE OF THE UNITED
STATES OF AMERICA**

**LIBRARY OF CONGRESS
WASHINGTON, D. C.**

**CERTIFICATE OF COPYRIGHT REGIS-
TRATION**

THIS IS TO CERTIFY (In conformity with section 55 of the Act to Amend and Consolidate the Acts 308 respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913), that two copies of the Book named herein have been deposited in this Office under the provisions of the Act of 1909, together with the affidavit prescribed in section 16 thereof; and that registration of a claim to copyright for the first term of twenty-eight years from the date of publication of said book has been duly made in the name of Dodd, Mead and Company, claimant of copyright, whose address is 443 Fourth Ave., New York, N. Y.; the title of the book registered is *Peg o' my Heart. A comedy of youth. By J. Hartley Manners.* This 309 novel is founded by Mr. Manners on his play of the same title. Illustrations by Martin Justice. New York: Dodd, Mead and Company, 1913; the author is a citizen of United States; the date of publication is October 30, 1913; the date of the completion of printing is October 16, 1913; the affidavit was received November 4, 1913; two copies were received November 4, 1913, and registration has been made as Class A, XXc., No. 358083.

**THORVALD SOLBERG,
Register of Copyright.**

[SEAL]

310 **Plaintiff's Exhibit No. 6 for Identification.**

WHEREAS, J. Hartley Manners composed, wrote and originated a play called "PEG O' MY HEART", which play has been and is in manuscript form; and

WHEREAS, the said J. Hartley Manners (hereinafter called "Author") did enter into an agreement on the 19th day of February, 1913, with Dodd, Mead & Company (hereinafter called "Publishers"), whereby the Author authorized the Publishers to publish, in novelized form, the said play "PEG O' MY HEART"; the said Author, however, reserving the rights of translation and of dramatization and serialization; and

WHEREAS, the said Publishers duly published in the United States a novelization of the play, under the said title "PEG O' MY HEART", and did duly comply with the provisions of the United States Copyright Code of 1909, entitled "An Act to Amend and Consolidate the Acts respecting Copyrights", and did duly comply with all the provisions of the said Act, with respect to the deposit of copies and registration of such work, and the giving of the notice of copyright, as provided in and by said Act, and in all other respects;

312 Now, THEREFORE, in consideration of the premises, and of the sum of one dollar, paid by the Author to the Publishers, receipt whereof is hereby acknowledged, the Publishers (Dodd, Mead & Company) do hereby sell, assign, transfer and set over unto the Author (J. Hartley Manners) for himself, his executors, administrators, heirs and assigns, the sole and exclusive right to translate the said copyrighted work into other languages or dialects, and to make any other version thereof;

Plaintiff's Exhibit No. 6 for Identification.

also the exclusive right to dramatize the said copyrighted work; also the exclusive right to perform or represent the copyrighted work publicly in any manner and by any method by which the said copyrighted work may be exhibited, performed, represented, produced or reproduced, and the exclusive photo-play and motion picture right and right to exhibit, perform, represent, produce or reproduce the said copyrighted work, or any dramatization thereof, by means of motion pictures, and to authorize and license others so to do, with the right to print, reprint, publish, copy and vend any of said translations, dramatizations, photo-play or motion picture, or the serializations of the said copyrighted work.

313

314

IN WITNESS WHEREOF, the said Publishers (Dodd, Mead & Company) have hereunto set their hands and seals this 27th day of December, 1916.

DODD MEAD & CO INC

[SEAL] By Edw H Dodd President

In presence of:

I. F. GRAHAM

342 West 16th St.

MILES W. NOURSE

443 4th Ave

N. Y. City

315

UNITED STATES OF AMERICA, } ss:
City, County & State of New York,

On this 11th day of January, 1917, before me personally came EDW. H. DODD, to me known, who being by me duly sworn, did depose and say: That he resides in New York City; that he is the president of Dodd, Mead & Co. Inc., the corporation described in and which executed the foregoing instrument; that he knew the seal of said corpora-

Plaintiff's Exhibit No. 6 for Identification.

316

tion; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of its board of directors, and that he signed his name thereto by like order.

HENRY J. DAUSER

[SEAL.] Notary Public Queens Co., N. Y.

Certificate filed in New York Co. No. 193.

The Act of March 4, 1909, sec. 44, provides: "That every assignment of copyright shall be recorded in the Copyright Office within THREE CALENDAR MONTHS after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."

317

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

Library of Congress—Washington

The foregoing assignment of copyright, dated December 27, 1916, and received for record in the Copyright Office on January 15, 1917, has been recorded in the Copyright Office, book 67, pages 188-189, in conformity with the laws of the United States respecting copyrights.

IN WITNESS WHEREOF, the seal of this Office has been hereto affixed this seventh day of February, 1917.

[SEAL]

THORVALD SOLBERG
Register of Copyrights

318

Plaintiff's Exhibit No. 7.

319

AGREEMENT made and entered into this Nineteenth day of January, one thousand nine hundred and twelve, between J. HARTLEY MANNERS of the City, County and State of New York, party of the first part, and OLIVER MOROSCO, of the Burbank Theatre, Los Angeles, California, party of the second part.

WITNESSETH:

WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled "Peg O' My Heart" and

320

WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW THEREFORE in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of One Dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows:

321

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

Plaintiff's Exhibit No. 7.

322 **SECOND:** The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of Five hundred (\$500.00) dollars upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged, and which sum shall be in advance of the royalties to accrue to the party of the first part under this agreement, and is not to be returned to the party of the second part under any circumstances whatsoever, but is to be credited as the payment of the first royalties as hereinafter provided, if the said play shall be produced by the said party of the second part under this agreement.

323

THIRD: The party of the second part agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years.

324

FOURTH: The party of the second part further agrees to pay to the party of the first part not later than the first Wednesday following each and every week during which a performance of the said play shall have been given, further sums as royalties, as follows:

Five per cent (5%) of the first four thousand five hundred (\$4500.) dollars gross weekly receipts; seven and one half (7 $\frac{1}{2}$) per cent on the next two thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent on all sums over that amount of six thousand five hundred (\$6,500) dollars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part.

Plaintiff's Exhibit No. 7.

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

325

SIXTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of "Peg O' My Heart" and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of Peg for at least one season or longer if considered advisable by both parties to this agreement.

326

J. H. M.
O. M.

SEVENTH: No alterations, eliminations or additions to be made in the play without the approval of the author.

EIGHTH: The rehearsals and production of the play to be under the direction of the author.

327

NINTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

TENTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained.

Plaintiff's Exhibit No. 7.

328

J. H. M.

ELEVENTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or corporation any of his aforesaid rights in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the ^{J. H. M.} play fail in New York City and on the road it is agreed between both parties it shall be released for stock.

329

TWELFTH: Whenever the play is released for Stock the royalties received from the Stock Theatres to be divided equally between the party of the first part and the party of the second part.

THIRTEENTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns administrators and successors.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

In the presence of

.....

330

.....

J. HARTLEY MANNERS (L. S.)
OLIVER MOROSCO (L. S.)

It is further agreed that after Miss Taylor shall have finished her season in "*Peg o' My Heart*" as provided for in this contract, her successor in the rôle of "*Peg*" for any subsequent tours shall be mutually agreeable to both parties to this contract.

J HARTLEY MANNERS
OLIVER MOROSCO.

Plaintiff's Exhibit No. 8 for Identification. 331

MEMORANDUM OF AGREEMENT, Made in duplicate and entered into this eighth (8th) Day of July, 1912, by and between OLIVER MOROSCO, of the City and County of Los Angeles, State of California, hereinafter designated as MANAGER, and LAURETTE TAYLOR, of the City, County and State of New York, hereinafter designated by the term ARTIST:

WITNESSETH:

WHEREAS, The said MANAGER is engaged in the theatrical business and is desirous of employing the said ARTIST for the time and upon the terms herein contained; 332

Now, THEREFORE, In consideration of the premises and of the mutual promises and covenants herein contained, and for the further consideration of one dollar (\$1.00) each to the other in hand paid, the receipt whereof is hereby mutually acknowledged, it is agreed by and between the said MANAGER and ARTIST as follows:—

FIRST

(a) That the said MANAGER does hereby engage and employ the said ARTIST for the theatrical season of nineteen hundred and twelve and thirteen (1912-1913), and for the theatrical season of nineteen hundred and thirteen and fourteen (1913-1914), and for the theatrical season of nineteen hundred and fourteen and fifteen (1914-1915), commencing on or about the fifteenth (15th) day of October in each of the said theatrical seasons and continuing for at least twenty-five (25) weeks during each of the said ^{theatrical} seasons at the weekly salary of four hundred dollars (\$400.00) for the theatrical

333

Plaintiff's Exhibit No. 8 for Identification.

334 season of nineteen twelve and thirteen; four hundred and fifty dollars (\$450.00) for the theatrical season of nineteen thirteen and fourteen, and five hundred dollars (\$500.00) for the theatrical season of nineteen fourteen and fifteen, payable weekly on such day of the week as may be mutually agreed upon; said ARTIST to render services in the leading female character of the play entitled "PEG O' MY HEART", or the leading female character of any other plays that may be suited to the talent and ability of said ARTIST, the play or plays, and the part or character to be performed therein by the ARTIST to be mutually agreed upon.

335 (b) Said MANAGER shall provide said ARTIST with the costumes and dresses required by said ARTIST in the portrayal of said characters which she may be cast to play during the life of this contract.

(c) Said MANAGER shall pay for the transportation of said ARTIST and her maid between the cities where the said ARTIST plays after the opening of this engagement, including sleeper and parlor car accommodations when the same can be reasonably had.

336 (d) The said MANAGER hereby agrees to star the said ARTIST in the said play, "PEG O' MY HEART", or in any other plays in which the said ARTIST may appear under the terms of this contract.

(e) The said MANAGER shall determine such theatres, opera houses, and other places of amusement in the United States and Canada, and the time in which she will present the said productions.

Said MANAGER shall give to the said ARTIST at least two weeks' notice in writing for the time designated by them for the closing of each of the afore-

Plaintiff's Exhibit No. 8 for Identification.

said theatrical seasons during the life of this 337
agreement.

SECOND

(a) Said ARTIST does hereby agree to become engaged and employed and by these presents has become engaged and employed by said MANAGER and to render to the best of her skill and ability her exclusive services for the number of performances each week as shall be in accordance with the legal custom of all places of amusement in such cities in which the said ARTIST shall be directed to appear and at such theatres, opera houses, and other places of amusement in the United States and Canada as she may be required by said MANAGER, and to play the star female character in the production "PEG O' MY HEART", and for other plays to be mutually decided upon hereafter for the aforesaid compensation and in accordance with the terms, conditions, and provisions herein contained.

338

(b) Said ARTIST shall receive no compensation for rehearsals or for performances in which she does not actually render services, or for non-playing nights during the said term of this contract which occur because of accident, or her sickness, public calamity, or from the act of God or the public enemy. The ARTIST shall, in any event, appear and be paid for at least twenty-five (25) weeks during each theatrical season of nineteen twelve and thirteen (1912-1913), nineteen thirteen and fourteen (1913-1914), and nineteen fourteen and fifteen (1914-1915).

339

(c) It is further expressly understood and agreed by both parties to this contract that in the event of "PEG O' MY HEART", or any other play that might be presented under this contract, being a

Plaintiff's Exhibit No. 8 for Identification.

340 failure in New York and on the road, then and in that event the said ARTIST does agree, at the option of said MANAGER, to play ten (10) weeks of her twenty-five (25) in Los Angeles, California, at one of the said MANAGER's theatres, in star parts in Hartley Manner's plays.

(d) Said MANAGER, however, further agrees that in the event of failure in New York, and on the road, of "PEG O' MY HEART", or any other plays that may be produced during the life of this contract, that during the aforesaid ten (10) weeks in Los Angeles a play will be selected for a return engagement in New York City, and the said MANAGER hereby specifically agrees that in such an event he will present the said ARTIST in New York each year during the life of this contract and for the run of said play, it being thoroughly understood however that if "PEG O' MY HEART", or any other play so selected, is a success in New York, that said ARTIST will remain in said play during its tour throughout the United States and Canada.

THIRD

Said MANAGER and said ARTIST further agree
 342 that said MANAGER shall have an option, and said option is hereby reserved to them, to continue this contract for three (3) additional seasons, from and after the expiration of the time herein mentioned, to-wit:—The season of nineteen fifteen and sixteen, (1915-1916), nineteen sixteen and seventeen, (1916-1917), and nineteen seventeen and eighteen (1917-1918), and they shall especially feature said ARTIST as a star and pay her the following compensation: \$500.00 ~~25~~ per week and—25—percent ~~OK OM~~ ^{OK L.}

to be declared at end of each season
 age of the net profits ^A for the entire three (3) ~~OK~~ ^{OK}
 seasons, and in the event of said MANAGER exercis- ~~OK L.~~

Plaintiff's Exhibit No. 8 for Identification.

ing the right to continue said contract for the additional three (3) seasons he shall give to said ARTIST a written notice of his intention so to do on or before January first, 1915. Said written notice may be given by mailing the same to last known residence of the said ARTIST, or to the hotel or place where she may then be stopping, or to the theatre where she may then be performing, or by handing the same to her. 343

(b) Should said option be exercised by the said MANAGER, then, commencing with the season of nineteen fifteen and sixteen (1915-1916), the ARTIST shall appear and be cast in a new play or plays with a star part suitable to her ability and talent, the plays and parts assigned her to be mutually agreed upon, and during the seasons of nineteen fifteen and sixteen (1915-1916), nineteen sixteen and seventeen (1916-1917), and nineteen seventeen and eighteen (1917-1918), she shall be permitted to appear and receive salary at the rate herein provided for not less than twenty-five (25) weeks each of said seasons. 344

IN WITNESS WHEREOF, the said MANAGER and the said ARTIST have hereunto set their hands and seals the day and year first above written. 345

OLIVER MOROSCO (L.S.)

LAURETTE TAYLOR (L.S.)

J. HARTLEY MANNERS, Witness.

State of California,
City and County of Los Angeles.

On this eighth (8th) day of July, 1912, before me personally appeared OLIVER MOROSCO, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he

Plaintiff's Exhibit No. 8 for Identification.

346 duly acknowledged to me that he executed the same for the uses and purposes mentioned therein.

State of California,
City and County of Los Angeles.

On this eighth (8th) day of July, 1912, before me personally appeared LAURETTE TAYLOR, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same for the uses and purposes mentioned therein.

AGREEMENT between OLIVER MOROSCO, party of the first part, and LAURETTE TAYLOR, party of the second part:

348 In consideration of the execution of an agreement entered into contemporaneously herewith, it is understood and agreed that if the party of the second part shall be enjoined and restrained by an order of any Court of competent jurisdiction from playing or performing under the management of the party of the first part, both parties hereto shall be released from the Agreement contemporaneously executed herewith by them, and each shall be released from the obligation thereof.

Witness our hands and seals this 8th day of July, 1912.

Plaintiff's Exhibit No. 9.

349

WHEREAS J. Hartley Manners, of the City, County and State of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19th, 1912 (hereinafter called "Original Agreement"), a copy of which is hereto attached, and by express reference thereto made a part hereof; and controversies have arisen and now exist between the parties hereto with reference to the meaning of said Original Agreement, and the parties hereto desire to settle and adjust said controversies, and to change said Original Agreement as hereinafter set forth;

350

NOW, THEREFORE, in consideration of the premises, and good and valuable consideration, moving from each of the parties hereto to the other, the receipt whereof by the parties hereto is hereby respectively acknowledged, the parties hereto do hereby enter into this Supplemental Agreement:

FIRST: The parties hereto do hereby settle and adjust all of said controversies.

SECOND: Said Original Agreement, except as by this Supplemental Agreement changed, is hereby in all respects ratified, confirmed and approved.

351

THIRD: Paragraphs "Sixth" and "Eighth" of said Original Agreement, and also the addendum or postscript to said Original Agreement (which addendum or postscript bears the signature of said Manners and said Morosco) are each and all hereby cancelled and eliminated from said Original Agreement.

Plaintiff's Exhibit No. 9.

352 **FOURTH:** There shall be, and there is hereby, added to said Original Agreement, the following, to be designated as new paragraph "Sixth" thereof:—

“Said Morosco may, contemporaneously, and (om) as long as this contract is in force from time to time, ~~during the term of this contract~~, produce, perform and represent said play “PEG O' MY HEART”, with or in as many companies in the United States and Canada as he, the said Morosco, may, in his sole discretion, deem proper; and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need *not be* engaged to appear and need not appear in the title role or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or members of the cast, the rehearsals, or production of said play by any of said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.”

353 **FIFTH:** There shall be, and there is hereby, added to said Original Agreement, to be known as new paragraph “Sixth-a” the following:—

354 “Said Morosco shall use reasonable efforts to direct that all advertising matter in the United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the role of “PEG” in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said com-

Plaintiff's Exhibit No. 9.

panies, in any manner that he, said Morosco, shall 355
deem fit or proper."

SIXTH: There shall be, and there is hereby, added to paragraph "Fourth" of said Original Agreement, the following provision:—

"The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of "PEG O' MY HEART" in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement."

356

SEVENTH: It is further agreed that paragraph "Eleventh" of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:—

"Eleventh: Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agreement or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement."

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EIGHTH: It is further agreed that paragraph "Twelfth" of said Original Agreement shall be and the same is hereby amended, so as to read as follows:

"Twelfth: Said play 'PEG O' MY HEART' may be released for stock, in the United States and

Plaintiff's Exhibit No. 9.

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(O. M.) Canada, during the ~~term of~~ this contract, when ever the net amount realized from all the companies producing the play ~~shall~~, in any one theatrical season, yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco."

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NINTH: It is further agreed that during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement, to the same extent and with the same effect as though this Sup-

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Plaintiff's Exhibit No. 9.

plemental Agreement had not been entered into.
This provision is not to be construed as a recogni-

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either party hereto the other
tion by ~~said~~ Manners that ~~said~~ Morosco had, under
the Original Agreement, or has, under this Agree- (L. M.)
ment, the right to give or authorize the giving of (J. D. B.)
cinematograph or motion or moving pictures of said (O. M.)
play.

TENTH: The said J. Hartley Manners and the said
Morosco hereby forever mutually release the one
the other from any and all claims and demands
which either one now has or asserts, or might have
or assert, against the other, for or on account of
any alleged violation of said Original Agreement,
on the part of either of the parties hereto, prior to
the execution of this Supplemental Agreement;
provided, however, that said Morosco shall and
will pay to said J. Hartley Manners, on or before (L. M.)
July 31st, 1914, any and all unpaid royalties which (J. D. B.)
said J. Hartley Manners shall be entitled to receive
from said Morosco under said Original Agreement
and this Supplemental Agreement.

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IN WITNESS WHEREOF, the parties hereto have
hereunto set their hands and seals, in original dup-
at the City of New York (L. M.)
licate, this 20th day of July, 1914. (J. D. B.)
(O. M.)

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..... (SEAL)
OLIVER MOROSCO (SEAL)

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**Plaintiff's Exhibit No. 10 for
Identification.**

THIS AGREEMENT, Made this 20th day of July, 1914, by and between J. HARTLEY MANNERS, of the City, County, and State of New York, party of the first part hereto, and OLIVER MOROSCO, of Los Angeles, California, party of the second part hereto,

WITNESSETH:

That, for good and valuable consideration, moving from each of the parties hereto to the other, the receipt whereof by the parties hereto is hereby 365 respectively acknowledged, and in further consideration of the mutual covenants and promises herein contained, by the parties hereto to be respectively performed, it is hereby agreed as follows:—

1. The certain contract dated February 19th, 1913, made by and between said J. Hartley Manners and said Oliver Morosco, by which contract said J. Hartley Manners grants to said Morosco the exclusive right and license to produce, perform, and represent in the United States of America and the Dominion of Canada, a certain play entitled "BARBARAZA" (which contract is hereinafter called the "Barbaraza contract", and a copy of which contract is hereto attached, marked "Exhibit 1", and by express reference thereto made a part hereof) is hereby cancelled, released, and forever discharged; and each of said parties to said Barbaraza contract is hereby forever released and discharged from all liability, of every kind and description, under said Barbaraza contract, to the other of said parties thereto; and the said J. Hartley Manners shall and will forthwith repay to said Morosco the sum of five hundred dollars (\$500.), which sum the said Morosco has heretofore paid under said Barbaraza contract to said J. Hartley Manners.

Plaintiff's Exhibit No. 10 for Identification.

2. The said Morosco and the said J. Hartley 367
Manners have heretofore entered into a contract,
dated February 19th, 1913 (hereinafter called the
"English contract", and a copy of which contract
is hereto attached, marked "Exhibit 2", and by
express reference thereto made a part hereof.)

a. The said English contract is hereby cancelled,
released and discharged, and each of said parties
to said English contract is hereby forever released
and discharged from all liability, of every kind and
description, under said English contract, to the
other of said parties thereto, except as is otherwise
hereinafter provided or specified. The sum of one 368
hundred pounds (£100), being the amount hereto-
fore paid by said Morosco to said J. Hartley Manners
under said English contract, shall be applied
as is provided in paragraph 2 of said English con-
tract.

b. The said play "PEG O' MY HEART" shall be
produced in London and in the United Kingdom
and the Provinces thereof, as hereinafter provided,
under the management and direction of said J. Hartley Manners, or, if he shall so elect, under the
management and direction of any other person
(who shall be a reputable and recognized London 369
theatrical producer, and who is hereinafter desig-
nated as "Nominee") whom said J. Hartley Manners
may select, and to whom he shall have the
right to assign the whole or any part of said J. Hartley Manners' interest in the said J. Hartley Manners' production (which is hereinafter some-
times termed the "English production") under this
paragraph 2 of this contract. The said English production shall begin in London, England, on
or before November 15th, 1914, but it may be made
for trial purposes during one or two weeks prior

Plaintiff's Exhibit No. 10 for Identification.

370 thereto, in the United Kingdom outside of said City of London. Immediately after the expiration of said one or two weeks, said English production shall be made in said City of London.

The first or preliminary cost of said English production (meaning hereby the original cost to said Morosco of the scenery, stage properties and furniture which he is to furnish for said English production) shall be advanced by said Morosco. Said cost, however, shall not exceed the sum of seven thousand five hundred dollars (\$7,500.) or fifteen hundred pounds (£1500). Said Morosco shall have the right, instead of buying new scenery, stage properties, and furniture, to send from the United States of America, to be used in said English production, the scenery, stage properties, and furniture heretofore purchased and used by him in the original production of said play in the City of New York, State of New York, which said scenery, properties, and furniture shall be shipped by said Morosco on or before October 1, 1914. The said original cost of the scenery, stage properties, and furniture (plus the cost of transportation, if any) so to be furnished by said Morosco, shall be repaid to him out of the first profits realized from said English production, so as aforesaid to be made under this paragraph 2 of this contract. The said cost of said production, so to be repaid to said Morosco, shall be charged as an expense of said English production. The said J. Hartley Manners shall select the members of the company or companies to give said English production, and Laurette Taylor Manners (whose stage name is Laurette Taylor, and who is the wife of said J. Hartley Manners) shall be the star or principal performer in the London company which is to produce said play, and shall enact the name

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part of "PEG" therein. Said J. Hartley Manners 373 hereby expressly covenants and agrees to, and he shall and will, furnish the services of said Laurette Taylor Manners in said star part in said London company, at least during the entire first continuous run of said play in said City of London, under the management of said J. Hartley Manners, or his said nominee; and said J. Hartley Manners covenants and agrees that said Laurette Taylor Manners shall and will play and perform such star part during said entire time to the best of her skill and ability.

e. Said J. Hartley Manners shall and will manage all of the companies that give said English production, or cause the same to be managed by his nominee, without any expense or charge whatsoever other than the royalties which the said J. Hartley Manners is entitled to receive and to be paid out of the gross receipts of said English production, at the rate specified in paragraphs Second, Fifth, and Sixth of said English contract, which said royalties shall be charged as an expense of said English production.

Said Laurette Taylor Manners shall receive and be paid, as full compensation for her said services in said London company which is to perform said play, the respective sums and emoluments specified in the certain contract dated July 8th, 1912, made by and between said Morosco and the said Laurette Taylor Manners, and which said contract is hereinafter called "the Laurette Taylor contract", and a copy of which contract is hereto attached as "Exhibit 3" and, by express reference thereto, made a part hereof. All of said sums and emoluments so to be paid to said Laurette Taylor Manners shall be charged as an expense of said English production. It is expressly covenanted and agreed that

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376 the entire average total weekly expense of every kind of said London company shall not exceed the sum of seven hundred (£700) pounds, and of provincial companies shall be at least fifteen per cent (15%) less; excepting that the salary to be paid to Laurette Taylor Manners shall be as herein specified.

d. If the said J. Hartley Manners and said Morosco shall mutually agree thereto in writing, then and only in that event, a company or companies in addition to the London company in which said Laurette Taylor Manners is to appear as the star

377 as aforesaid, may be sent out to perform said play in the United Kingdom and the Provinces outside of London. But the said Manners may, if he so elects, give performances in the Provinces outside of London, with the said Laurette Taylor Manners and with the company in which said Laurette Taylor Manners appeared in London as the star.

e. The net profits realized from any and all performances of said play, whether said performances be given by the said London company of which said Laurette Taylor Manners is to be the star as aforesaid, or by any other company or companies per-

378 forming the said play in the United Kingdom and the Provinces, shall be divided and paid in the proportion of fifty per cent (50%) to said J. Hartley Manners, and the remaining fifty per cent (50%) to said Morosco; and the total losses, if any, resulting from any or all of said performances shall be borne and paid in like proportion by said J. Hartley Manners and said Morosco.

f. Said J. Hartley Manners shall keep, or cause to be kept, full, correct, and complete books of account of all of the business of all of said companies,

Plaintiff's Exhibit No. 10 for Identification.

to all of which books said Morosco or his designated agent shall at all times during business hours have and be given free and uninterrupted access, with the right to make copies or extracts therefrom; and the said J. Hartley Manners shall render to said Morosco weekly, full and correct accountings of the business of every such company performing said play under the provisions of this paragraph 2 of this contract; and the profits shall be allotted every two weeks, in the proportions hereinbefore provided, and said Morosco's said share thereof shall be paid by said J. Hartley Manners to said Morosco, or his designated agent, on the Tuesday following the week herein provided for the allotment of said profits. Such payment shall be made to such designated agent of said Morosco in London, England, or if there shall be no such designated agent, then such payment shall be made into such bank in London, to the credit of said Morosco, as said Morosco shall from time to time designate. If there be any net losses during any one week, after applying all moneys in the hands of said Manners, or his nominee, properly applicable to the payment of losses, then each of the parties hereto shall, on or before Tuesday of the week following, contribute a sum equal to fifty per cent to pay such losses, but due notice of the amount so

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to be contributed by said Morosco shall ^{first} be given ^{to him} ^{by} ^{letter or cable.} ^{OM}

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g. Said Morosco shall have, and is hereby given, the right to designate and select his own separate representative for each and every such company performing said play. Each of said representatives shall always have and be given, during business hours, free and uninterrupted access to all books,

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Plaintiff's Exhibit No. 10 for Identification.

382 vouchers, and papers of the business of the company to which he is assigned, and may be present at the counting up and checking of the house, and shall be kept by said J. Hartley Manners, or his nominee, promptly and fully informed and advised respecting the doings and business of the company to which such representative is assigned. Each such representative shall receive a salary of not to exceed fifteen pounds (£15) per week, which shall be charged as an expense of the particular company to which such representative is assigned.

h. Unless said cancellation of said English contract shall become inoperative, and said English contract be revived, as hereinafter provided, or except as is otherwise hereinafter provided, the provisions of this paragraph 2 of this contract shall remain in full force and effect for three years from the date of the first performance of said play under the said management of said J. Hartley Manners, or his nominee, and, at the expiration of said three-year period, said Morosco shall have the option to renew the provisions of this paragraph 2 of this contract for another period of three years, on the terms and conditions herein specified.

384 i. It is expressly covenanted and agreed that if the company which is to perform said play with Laurette Taylor Manners in the star part as aforesaid, shall sustain net losses during the first eight weeks of the production of said play in London, then and in that event, said J. Hartley Manners may, immediately after the expiration of said eight weeks, use the said company, or some other company to be selected by said J. Hartley Manners, to make a further performance of said play for a period of four weeks, either in the said City of London or in the Provinces of the United King-

Plaintiff's Exhibit No. 10 for Identification.

dom; but said further performances shall be at the sole risk, cost and expense of said J. Hartley Manners, that is to say,—all losses sustained after the said eight weeks' performance, and while said further performance is being given, either in said city of London or in the Provinces, for said period of four weeks, shall be borne and sustained solely by said J. Hartley Manners.

If, during the said eight weeks of performance of said play, and during the said additional four weeks further performance (if said J. Hartley Manners shall elect to give such further performance as aforesaid) there shall not be a total net profit of at least one thousand pounds (£1,000) then and in that event said J. Hartley Manners, provided he elects in writing to do so, within one week thereafter, shall have the right to be fully released and discharged from any and all liability and obligation to make further productions of said play under the foregoing provisions of this contract; and if he shall so elect, he shall at once, by cable, notify the said Morosco to that effect. If there shall not be a total net profit of one thousand pounds (£1,000) as aforesaid, then the said Morosco shall, within one week after he shall have received from said J. Hartley Manners, or his nominee, written notice of such fact, have the same right as is hereinbefore given to said J. Hartley Manners, to be released and discharged from the provisions of this paragraph "2" of this contract, provided the said Morosco shall, within said one week, give notice to said J. Hartley Manners of the exercise of such right by said Morosco; such notice may be given by mail or cable, addressed to said J. Hartley Manners at the theatre at which said play shall have been first produced in London, England. If either party hereto shall have exercised the aforesaid right under the aforesaid

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D.G.
O.M.

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388 conditions to release and discharge this paragraph ^{pg}
2 of this contract, then and in that event the said
Morosco, at his sole option and election, may cancel
the provision contained in subdivision "a" of para-
graph 2 of this contract, providing for the cancella-
tion of said English contract, and said provision
shall be and become inoperative and void; and the
said Morosco and the said J. Hartley Manners shall
be immediately restored to all of their respective
rights and privileges, benefits and advantages, and
be subjected to all of their respective obligations
created in and by said English contract, but in that
event the said J. Hartley Manners shall not have the
right, as is provided in said English contract, to
insist or ask that the title role be played by said
Laurette Taylor Manners, and the said J. Hartley
Manners shall have no right to be consulted re-
specting the cast or membership of the company
that may be selected or created by said Morosco to
perform said play under said English contract; and
that the said Morosco shall then be obligated to pay
to, and the said J. Hartley Manners shall be entitled
to receive from said Morosco, no profits or compen-
sation or emoluments of any kind other than the
royalties expressly specified in the said English ^{pg}
contract. ^{OM}

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j. The said right and option of the said Morosco
to have said cancellation of said English contract
declared inoperative, and to have said English con-
tract revived as aforesaid, shall be exercised (if
exercised by him), by written notice to be mailed
by said Morosco and addressed to said J. Hartley
Manners at the theatre at which said play shall have
been first produced in London, England. Said writ-
ten notice shall be given by said Morosco within
three months after he shall have received direct

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from said J. Hartley Manners written information to the effect that there has not been one thousand pounds (£1,000) net profits as aforesaid. Said written notice of the exercise of such election by said Morosco, shall specify a date not less than fifteen (15) days, or more than sixty (60) days, after the ^{D.G.} _{O.M.} date of the mailing of the notice last aforesaid, within which the said revival of said English contract is to take effect, and the first performance of said play is to be given by said Morosco.

3. It is hereby further covenanted and agreed that the said Laurette Taylor contract (being exhibit 3 hereto) shall be forever released, cancelled and discharged, and the said Morosco and said Laurette Taylor Manners shall be forever mutually released and discharged from any and all obligations to, and any and all claims and demands of every kind against, each other under said Laurette Taylor Contract; that the said Laurette Taylor ^{D.G.} _{O.M.} Manners shall and will faithfully perform the services of the star or principal performer, and act the part of "Peg" in said London Company, during the entire first continuous run of said play, when produced in said City of London, under the management of said J. Hartley Manners, or his said nominee, as provided in subdivision "b" of paragraph 2 of this contract.

4. Said J. Hartley Manners hereby covenants and agrees that to the extent that any of the provisions of this contract pertain to or concern said Laurette Taylor Manners, he, said J. Hartley Manners, has full right and authority to bind said Laurette Taylor Manners, and that he, said J. Hartley Manners, shall and will cause her to become personally a party to such provisions of this contract as pertain to or affect her, and that he will secure, on or before August 15th, 1914, her signature to the memorandum appended to this contract.

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Plaintiff's Exhibit No. 10 for Identification.

394 5. It is clearly understood and agreed that the parties hereto are not and do not intend to become partners in the London company, or any other company producing the said play "PEG O' MY HEART" in London, or the provinces, and that neither party has the right to nor shall pledge the credit of the other, in connection with said production; the intent being that the said Morosco shall receive, as before

herein ^A specified, a certain sum to be measured ^{DG} by the profits from the production in London and ^{OM} the Provinces, given by the said Manners or his hereunder

395 nominee, ^A for and in consideration of the cancellation of the English contract, as provided in paragraph 2, subdivision a, hereof. ^{DG} ^{OM}

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in original duplicate, at the City of New York, on the day and date first above written.

OLIVER MOROSCO. (SEAL).

J. HARTLEY MANNERS (SEAL).

by DAVID GERBER, his Atty in fact.

FOR GOOD AND VALUABLE CONSIDERATION, the undersigned, LAURETTE TAYLOR MANNERS (whose stage name is Laurette Taylor) hereby consents to and approves of the foregoing contract, and hereby agrees to comply with and be bound by and perform all of the provisions of the foregoing contract that concern or pertain to her, and which, by the terms of said contract, are to be by her performed.

This memorandum shall take effect as of July 20th 1914, and is executed at London, England, this day of August, 1914, because of the absence of the undersigned from the United States of America at the time of the execution of the foregoing contract.

..... (SEAL).

**Exhibit (Part of Plaintiff's Exhibit No. 397
10 for Identification) 1.**

AGREEMENT, made and entered into this Nineteenth day of February, one thousand nine hundred and thirteen, between J. HARTLEY MANNERS of the City, County and State of New York, party of the first part, and OLIVER MOROSCO, of the Burbank Theatre, Los Angeles, California, party of the second part,

WITNESSETH :

WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled "BARBARAZA," and

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WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and promises of the parties of these presents hereinafter contained and in consideration of the sum of One Dollar, lawful money of the United States, this day by each of the parties hereto to the other in hand paid, the receipt whereof is hereby reciprocally acknowledged, and for other good, valuable and adequate consideration, it is hereby understood, covenanted and agreed by and among the parties to the agreement as follows:

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FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 1.

400 exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

401 **SECOND:** The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of Five Hundred Dollars (\$500.00) upon the signing and execution of this agreement, the receipt whereof is hereby acknowledged, and which sum shall be in advance of the royalties to accrue to the party of the first part under this agreement, and is not to be returned to the party of the second part under any circumstances whatever, but is to be credited as the payment of the first royalties as hereinafter provided, if the said play shall be produced by the said party of the second part under this agreement.

402 **THIRD:** The party of the second part further agrees to pay to the party of the first part not later than the first Wednesday following each and every week during which a performance of the said play shall have been given, further sums as royalties as follows:

Five per cent. (5%) of the first four thousand five hundred dollars (\$4,500.00) gross weekly receipts; seven and one-half per cent (7½%) of the next two thousand dollars (\$2,000.00) gross weekly receipts; and ten per cent. (10%) on all sums over that amount of six thousand five hundred dollars (\$6,500.00) gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part.

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 1.

FOURTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of "Barbaraza", and that the play will have a production in New York City, and will be continued on the road for at least one (1) season, or longer, if considered advisable by both parties to this agreement, with Miss Taylor, in the part of "Barbaraza." 403

FIFTH: No alterations, eliminations or additions to be made in the play without the approval of the author. 404

SIXTH: The rehearsals and production of the play to be under the direction of the author.

SEVENTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

EIGHTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained. 405

NINTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer, or sell to any person or persons, firm or corporation any of the aforesaid rights in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the play fail in New York City and on the road, it is

Exhibit (Part of Plaintiff's Exhibit No. 10 for Identification) 1.

406 agreed between both parties that it will be released for stock.

TENTH: Whenever the play is released for stock the royalties received from the Stock Theatres are to be divided equally between the party of the first part and the party of the second part.

407 **ELEVENTH:** It is further agreed that after Miss Taylor shall have finished her seasons in "Barbaraza" as provided for in the contract, her successor in the role of "Barbaraza" for any subsequent tours shall be mutually agreeable to both parties in this contract.

TWELFTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators and successors.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

In the presence of

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.....

(Signed) **J. HARTLEY MANNERS** (L.S.)
 (Signed) **OLIVER MOROSCO** (L.S.)

This play is to be used by Miss Laurette Taylor when it is deemed advisable by both parties to follow the run of "Peg O' My Heart."

J H M **O M**

**Exhibit (Part of Plaintiff's Exhibit No. 409
10 for Identification) 2.**

AGREEMENT, made this nineteenth day of February, One Thousand nine hundred and thirteen, between OLIVER MOROSCO, Theatrical Manager, of the City and County of Los Angeles, State of California, U. S. A., of the one part, and JOHN HARTLEY MANNERS, Author, of the City, County and State of New York, U. S. A., of the other part.

WHEREAS the said John Hartley Manners agrees to let, and the said Oliver Morosco agrees to hire the exclusive rights of representation in London 410 and the Provinces of the United Kingdom, of the play by the said Author at present entitled "Peg O' My Heart." The said Author agrees to grant the said Oliver Morosco a license to perform the play on the following terms and conditions:

1.—The said Oliver Morosco shall pay one hundred pounds (100 lbs.) down to the said Author on signing this agreement on account of fees.

2.—The said Oliver Morosco shall pay to the said Author for the performance of the said play, when played in London, three pounds (3 lbs.) a performance when the gross weekly receipt shall not exceed the sum of eight hundred pounds (800 lbs.) ; five per cent of the gross weekly receipts if they shall exceed eight hundred pounds (800 lbs) but not exceed one thousand pounds (1000 lbs.) ; if the gross weekly receipt shall exceed one thousand pounds (1000 lbs.) but shall not exceed one thousand and two hundred pounds (1,200 lbs.) the fees shall be seven and a half per cent of such gross receipts, but if the gross weekly receipts shall reach or exceed one thousand. two hundred pounds (1,200 lbs),

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 2.

412 then Oliver Morosco shall pay ten per cent of the whole of such gross weekly receipts. Such payments to be made weekly, after the said deposit of one hundred pounds (100 lbs) has been exhausted, not later than the Wednesday following any week in which any such representation shall have taken place.

3.—The said Oliver Morosco shall furnish the said Author with certified copies of returns of all such performances, and shall also give him all reasonable access, if required, to all vouchers and documents necessary for verifying same.

413 4.—Oliver Morosco agrees that at all performances of the said play the text as contained in the prompt copy supplied by the Author shall be spoken without intentional interpolation, alteration or omission. Should it be thought advisable to make any alterations in the dialogue, they shall be made by the Author, who shall not unreasonably withhold consent to make such alterations should Oliver Morosco request him to do so.

414 5.—If the said Oliver Morosco should arrange to send a tour or tours in the Provinces, he shall pay to the said Author fees on the same scale as those for London at the following first class towns:— Liverpool, Manchester, Birmington, Edinburgh, Glasgow, Dublin, Leeds. At all other towns visited in the United Kingdom the fees shall be two pounds (2 lbs) a performance when the gross weekly receipts shall not exceed three hundred pounds (300 lbs) but if the gross receipts shall reach three hundred pounds (300 lbs) but not exceed six hundred pounds (600 lbs) then Oliver Morosco shall pay

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 2.

five per cent of such gross weekly receipts right through, if the gross weekly receipts shall exceed six hundred pounds (600 lbs) Oliver Morosco shall pay seven and a half per cent of such gross weekly receipts right through. The said Oliver Morosco shall announce the name of the said Author in all bills, programmes and advertisements, except newspaper advertisements. This agreement shall remain in force for three years from the date of the first performance, but at the expiration of this period Oliver Morosco shall have the option of renewing this agreement on the same terms, provided that he undertakes that the Author's play shall be performed for not less than fifteen (15) weeks in such year. 415 416

6.—Should the said play be performed in any week for a lesser number of performances than seven, the fees shall be calculated on an average of the gross receipts of such lesser number of performances and pro rata to the terms of this agreement, a week being understood as seven performances.

As WITNESS the parties have set their signature hereto.

(Signed) OLIVER MOROSCO 417

(Signed) J. HARTLEY MANNERS

The cast of the play including the character of Peg to be mutually agreeable to both parties to the contract, and the play to be produced within three years from the date of this contract unless otherwise mutually agreed upon.

J. H. M.

O. M.

418 **Exhibit (Part of Plaintiff's Exhibit No. 10 for Identification) 3.**

MEMORANDUM OF AGREEMENT, Made in duplicate and entered into this eighth (8th) day of July, 1912, by and between OLIVER MOROSCO, of the City and County of Los Angeles, State of California, hereinafter designated as MANAGER, and LAURETTE TAYLOR, of the City, County and State of New York, hereinafter designated by the term ARTIST:

WITNESSETH:

419 WHEREAS, The said MANAGER is engaged in the theatrical business and is desirous of employing the said ARTIST for the time and upon the terms herein contained:

Now, THEREFORE, In Consideration of the premises and of the mutual promises and covenants herein contained, and for the further consideration of one dollar (\$1.00) each to the other in hand paid, the receipt whereof is hereby mutually acknowledged, it is agreed by and between the said MANAGER AND ARTIST as follows:—

FIRST

420

(a) That the said MANAGER does hereby engage and employ the said ARTIST for the theatrical season of nineteen hundred and twelve and thirteen (1912-1913), and for the theatrical season of nineteen hundred and thirteen and fourteen (1913-1914), and for the theatrical season of nineteen hundred and fourteen and fifteen (1914-1915), commencing on or about the fifteenth (15th) day of October in each of the said theatrical seasons and continuing for at least twenty-five (25) weeks during each of the said theatrical seasons at the weekly salary of four hundred dollars (\$400.00) for the

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

theatrical season of nineteen twelve and thirteen; 421
four hundred and fifty dollars (\$450.00) for the
theatrical season of nineteen thirteen and fourteen,
and five hundred dollars (\$500.00) for the
theatrical season of nineteen fourteen and fifteen,
payable weekly on such day of the week as may be
mutually agreed upon; said ARTIST to render
services in the leading female character of the play
entitled "PEG O' MY HEART", or the leading female
character of any other plays that may be suited to
the talent and ability of said ARTIST, the play or
plays, and the part or character to be performed
therein by the ARTIST to be mutually agreed upon. 422

(b) Said MANAGER shall provide said ARTIST
with the costumes and dresses required by said
ARTIST in the portrayal of said characters which
she may be cast to play during the life of this con-
tract.

(c) Said MANAGER shall pay for the transporta-
tion of said ARTIST and her maid between the cities
where the said ARTIST plays after the opening of
this engagement, including sleeper and parlor car
accommodation when the same can be reasonably
had. 423

(d) The said MANAGER hereby agrees to star the
said ARTIST in the said play, "PEG O' MY HEART",
or in any other plays in which the said ARTIST may
appear under the terms of this contract.

(e) The said MANAGER shall determine such
theatres, opera houses, and other places of amuse-
ment in the United States and Canada, and the
time in which she will present the said productions.

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

424 Said MANAGER shall give to the said ARTIST at least two weeks' notice in writing for the time designated by them for the closing of each of the aforesaid theatrical seasons during the life of this agreement.

SECOND

425 (a) Said ARTIST does hereby agree to become engaged and employed and by these presents has become engaged and employed by said MANAGER and to render to the best of her skill and ability her exclusive services for the number of performances each week as shall be in accordance with the legal custom of all places of amusement in such cities in which the said ARTIST shall be directed to appear and at such theatres, opera houses, and other places of amusement in the United States and Canada as she may be required by said MANAGER, and to play the star female character in the production "PEG O' MY HEART", and for other plays to be mutually decided upon hereafter for the aforesaid compensation and in accordance with the terms, conditions, and provisions herein contained.

426 (b) Said ARTIST shall receive no compensation for rehearsals or for the performances in which she does not actually render services, or for non-playing nights during the said term of this contract which occur because of accident, or her sickness, public calamity, or from the act of God or the public enemy. The ARTIST shall, in any event, appear and be paid for at least twenty-five weeks during each theatrical season of nineteen twelve and thirteen (1912-1913) nineteen thirteen and fourteen (1913-1914), and nineteen fourteen and fifteen (1914-1915).

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

(c) It is further expressly understood and agreed by both parties to this contract that in the event of "PEG O' MY HEART", or any other play that might be presented under this contract, being a failure in New York and on the road, then and in that event the said ARTIST does agree, at the option of said MANAGER, to play ten (10) weeks of her twenty-five (25) in Los Angeles, California, at one of the said MANAGER's theatres, in star parts in Hartley Manner's plays. 427

(d) Said MANAGER, however, further agrees that in the event of failure in New York, and on the road, of "PEG O' MY HEART", or any other plays that may be produced during the life of this contract, that during the aforesaid ten (10) weeks in Los Angeles a play will be selected for a return engagement in New York City, and the said Manager specifically agrees that in such event he will present the said ARTIST in New York each year during the life of this contract and for the run of said play, it being thoroughly understood however, that if "PEG O' MY HEART", or any other play so selected, is a success in New York that said ARTIST will remain in said play during its tour throughout the United States and Canada. 428 429

THIRD

Said MANAGER and said ARTIST further agree that said MANAGER shall have an option, and said option is hereby reserved to them, to continue this contract for three (3) additional seasons, from and after the expiration of the time herein mentioned, to-wit:—The season of nineteen fifteen and sixteen (1915-1916), nineteen sixteen and seventeen (1916-

**Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.**

430 1917), and nineteen seventeen and eighteen (1917-1918), and they shall especially feature said ARTIST as a star and pay her the following compensation: \$500.00 per week and 25 per cent of the net profits to be declared at end of each season for the entire three (3) seasons, and in the event of said MANAGER exercising the right to continue said contract for the additional three (3) seasons he shall give to said ARTIST a written notice of his intention so to do on or before January First, 1915. Said written notice may be given by mailing the same to last known residence of the said ARTIST, or to the hotel or place where she may then be stopping, or to the theatre where she may then be performing, or by handing the same to her.

431 (b) Should said option be exercised by the said MANAGER, then, commencing with the season of nineteen fifteen and sixteen (1915-1916), the ARTIST shall appear and be cast in a new play or plays with a star part suitable to her ability and talent, the plays and parts assigned her to be mutually agreed upon, and during the seasons of nineteen fifteen and sixteen (1915-1916), nineteen sixteen and seventeen (1916-1917) and nineteen seventeen and eighteen (1917-1918), she shall be permitted to appear and receive salary at the rate herein provided for not less than twenty-five (25) weeks each of said seasons.

IN WITNESS WHEREOF, the said MANAGER and the said ARTIST have hereunto set their hands and seals the day and year first above written.

(Signed) OLIVER MOROSCO (L. S.)
(signed) LAURETTE TAYLOR (L. S.)

J. HARTLEY MANNERS Witness.

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

State of California
City and County of Los Angeles,

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On this eighth (8th) day of July, 1912, before
me personally appeared OLIVER MOROSCO, to me
known and known to me to be the individual de-
scribed in and who executed the foregoing instru-
ment, and he duly acknowledged to me that he
executed the same for the uses and purposes men-
tioned therein.

.....

434

State of California,
City and County of Los Angeles,

On this eighth (8th) day of July, 1912, before
me personally appeared LAURETTE TAYLOR, to me
known and known to me to be the individual de-
scribed in and who executed the foregoing instru-
ment, and she duly acknowledged to me that she
executed the same for the uses and purposes men-
tioned therein.

.....

435

AGREEMENT between OLIVER MOROSCO, party of
the first part, and LAURETTE TAYLOR, party of the
second part:

In consideration of the execution of an agree-
ment entered into contemporaneously herewith, it
is understood and agreed that if the party of the

Exhibit (Part of Plaintiff's Exhibit No. 10 for
Identification) 3.

436 second part shall be enjoined and restrained by an order of any Court of competent jurisdiction from playing or performing under the management of the party of the first part, both parties hereto shall be released from the Agreement contemporaneously executed herewith by them, and each shall be released from the obligation thereof.

Witness our hands and seals this 8th day of July,
1912.

.....

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

J. HARTLEY MANNERS,
Plaintiff,
AGAINST
OLIVER MOROSCO,
Defendant.

In Equity.

440

WALTER C. NOYES and DAVID GERBER, both of
New York City, for plaintiff.

CHARLES H. TUTTLE and WILLIAM KLEIN, both
of New York City, for defendant.

For convenience of counsel interested in this class of case, the essential features of the two contracts between the parties, are here set forth. For brevity, they will be referred to as the First and Second contracts.

FIRST CONTRACT.

441

"WHEREAS the party of the first part is the sole and exclusive author and owner of a certain dramatic composition at present entitled 'Peg O' My Heart' and

WHEREAS, the party of the second part wishes to obtain the exclusive right and license to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

NOW THEREFORE in consideration of the premises * * * it is hereby understood,

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442 covenanted and agreed by and among the parties to the agreement as follows:

FIRST: The party of the first part hereby grants and by these presents hereby does grant to the party of the second part subject to the terms, conditions and limitations hereinafter expressed, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada.

443 SECOND: The party of the second part in consideration of such grant hereby agrees to pay to the party of the first part the sum of Five hundred (\$500.00) dollars upon the signing and execution of this agreement * * *

in advance of the royalties to accrue to the party of the first part under this agreement * * *

THIRD: The party of the second part agrees to produce the play not later than January first, 1913 and to continue the said play for at least seventy-five performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years.

FOURTH: The party of the second part further agrees to pay to the party of the first part * * * further sums as royalties, as follows:

444 Five per cent (5%) of the first four thousand five hundred (\$4500) dollars gross weekly receipts; seven and one half (7½) per cent on the next two thousand (\$2,000) dollars gross weekly receipts; and ten (10%) per cent on all sums over that amount of six thousand five hundred (\$6,500) dollars gross weekly receipts—which said sum of money, together with certified box-office statements, the party of the second part agrees to send to the party of the first part.

FIFTH: The said party of the second part further agrees that if during any one theatrical year, such year to begin on the first day of

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October, said play has not been produced or 445 presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part.

SIXTH: It is further agreed that the said party of the second part shall present the said play in first class theatres with a competent company, the said company to be mutually satisfactory to both the parties to this agreement, and with Miss Laurette Taylor in the title role of 'Peg O' My Heart' and that the play will have a production in New York City and will be continued on the road with Miss Taylor in the part of 'Peg' for at least one season or longer if considered advisable by both parties to this agreement. 446

SEVENTH: No alterations, eliminations or additions to be made in the play without the approval of the author.

EIGHTH: The rehearsals and production of the play to be under the direction of the author.

NINTH: The name of the author to appear on all advertising, reading and printed matter used in connection with the play.

TENTH: The author to have the right to print and publish the play, but this right is not to be exercised by the author within six months after the production of said play in New York City unless the written consent of the manager has first been obtained. 447

ELEVENTH: Said manager does hereby agree that he will not lease, sub-let, assign, transfer or sell to any person or persons, firm or corporation any of his aforesaid rights, in and to the said dramatic composition or play without the written consent of said author has first been obtained. Should the play fail in New York City and on the road it is agreed between both parties it shall be released for stock.

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TWELFTH: Whenever the play is released for Stock the royalties received from the Stock Theatres to be divided equally between the party of the first part and the party of the second part.

THIRTEENTH: This agreement is binding upon the parties hereto, upon their heirs, executors, assigns, administrators and successors. * * *

To this agreement, there was an addendum as follows:

449

"It is further agreed that after Miss Taylor shall have finished her season in 'Peg O' My Heart' as provided for in this contract, her successor in the role of 'Peg' for any subsequent tours shall be mutually agreeable to both parties to this contract.

J. HARTLEY MANNERS,
OLIVER MOROSCO."

SECOND CONTRACT.

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"WHEREAS, J. Hartley Manners, of the City, County and State of New York, party of the first part hereto, and Oliver Morosco, of Los Angeles, California, party of the second part hereto, have heretofore entered into an agreement, dated January 19th, 1912 (hereinafter called 'Original Agreement') a copy of which is hereto attached, and by express reference thereto made a part hereof; and controversies have arisen and now exist between the parties hereto with reference to the meaning of said Original Agreement, and the parties hereto desire to settle and adjust said controversies, and to change said Original agreement as hereinafter set forth:

NOW, THEREFORE, in consideration of the premises * * * the parties hereto do hereby enter into this Supplemental Agreement:

FIRST: The parties hereto do hereby settle and adjust all of said controversies.

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SECOND: Said Original Agreement, except 451 as by this Supplemental Agreement changed, is hereby in all respects ratified, confirmed and approved.

THIRD: Paragraphs 'Sixth' and 'Eighth' of said Original Agreement, and also the addendum or postscript to said Original Agreement (which addendum or postscript bears the signatures of said Manners and said Morosco) are each and all hereby cancelled and eliminated from said Original Agreement.

FOURTH: There shall be and there is hereby added to said Original Agreement, the following, to be designated as new paragraph 'Sixth' thereof:

452

'Said Morosco may, contemporaneously, and from time to time, as long as this contract is in force, produce, perform and represent said play 'Peg O' My Heart', with or in as many companies in the United States and Canada as he, the said Morosco, may, in his sole discretion, deem proper; and it is further agreed that Laurette Taylor (Laurette Taylor Manners) need not be engaged to appear and need not appear in the title role or star or principal part, or any other part in any of said companies, and that the said Morosco need in no way consult or confer with the said J. Hartley Manners respecting the star, the cast, the featured member or members of the cast, the rehearsals, or production of said play by any of said companies—of all of which the said Morosco shall have, and is hereby given, sole and exclusive charge and control.'

453

FIFTH: There shall be, and there is hereby, added to said Original Agreement, to be known as new paragraph 'Sixth-a' the following:

'Said Morosco shall use reasonable efforts to direct that all advertising matter in the United States and Canada shall contain a reference to the fact that said Laurette Taylor was the creator of the role of 'Peg'

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454 in said play; it being the intention of this provision that said Morosco shall use reasonable endeavors to have said Laurette Taylor's name featured in the manner above indicated, but it being expressly understood and agreed that said Morosco shall have the unlimited right and privilege to feature, star, and advertise any other person or persons appearing or to appear in any of said companies, in any manner that he, said Morosco, shall deem fit or proper.'

SIXTH: There shall be, and there is, hereby, added to paragraph 'Fourth' of said Original Agreement, the following provision:

455 'The royalties herein specified shall be paid to the said Manners by said Morosco at the rate herein set forth, for every company performing the said play of 'Peg O' My Heart' in the United States or Canada, under the management of said Morosco, under said Original Agreement or this Supplemental Agreement.'

SEVENTH: It is further agreed that paragraph 'Eleventh' of said Original Agreement shall be, and the same is hereby, amended so as to read as follows:

456 'ELEVENTH: Said Morosco is hereby expressly authorized to lease, sub-let, assign, transfer, or sell, to any person or persons, firm or corporation, whatsoever, any of his rights acquired under said Original Agreement or this Supplemental Agreement; it being expressly understood and agreed that no such leasing, sub-letting, assignment, transfer, or sale shall in any way release or discharge said Morosco from his personal liability to pay to said J. Hartley Manners the royalties in amounts, manner, and at the time, as specified in said Original Agreement and in this Supplemental Agreement.'

EIGHTH: It is further agreed that paragraph 'Twelfth' of said Original Agreement shall be

Opinion.

and the same is hereby amended, so as to read 457
as follows:

TWELFTH: Said play 'Peg O' My Heart' may be released for stock, in the United States and Canada, during the time that this contract is in force, whenever the net amount realized from all the companies producing the play in any one theatrical season shall yield a net profit of less than two thousand (\$2,000) dollars. Whenever the said play is released for stock company or companies, the royalties received from the stock theatres shall be divided equally between the said J. Hartley Manners and said Morosco as and when received by said Morosco.

458

NINTH: It is further agreed that during the period of four years from and after the date hereof, neither party hereto shall or will, without the written consent of the other party hereto first had and obtained, directly or indirectly, produce, represent, or exhibit, or permit, allow or suffer to be produced, represented, or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit, the said play by cinematograph or motion or moving pictures in the United States or Canada. It is further expressly understood and agreed that after the expiration of said four-year period, the rights, whatever they may be, of either said Morosco or said J. Hartley Manners, to directly or indirectly produce, represent or exhibit, or permit, allow or suffer to be produced, represented or exhibited, or sell, lease, give or transfer, any permission, privilege or right to produce, represent or exhibit the said play by cinematograph or motion or moving pictures in the United States or Canada, shall be such as said Morosco and said J. Hartley Manners shall respectively be legally entitled to under and pursuant to the terms of said Original Agreement, to the said extent and with the same effect as though this Supplemental Agreement had not

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460 been entered into. This provision is not to be construed as a recognition by either party hereto that the other had, under the Original Agreement, or has, under this Agreement, the right to give or authorize the giving of cinematograph or motion or moving pictures of said play.

461 TENTH: The said J. Hartley Manners and the said Morosco hereby forever mutually release the one the other from any and all claims and demands which either one now has or asserts, or might have or assert, against the other, for or on account of any alleged violation of said Original Agreement, on the part of either of the parties hereto, prior to the execution of this Supplemental Agreement;

 * * *

MAYER, District Judge: (after stating the foregoing facts) :—

462 The suit is brought, in effect, to restrain defendant (1) from playing, producing or controlling in any manner, the dramatic composition "Peg O' My Heart" and (2) from manufacturing or presenting any motion picture based upon "Peg O' My Heart." The case requires only the construction of the two contracts, testimony in respect of customs and conversations antecedent to the contracts having been excluded.

1. Plaintiff urges that the first contract amounts only to a license, revocable at his option, except as to the interest of defendant for the period referred to in paragraph "Third" of the first contract—and that time, according to plaintiff, expired in June, 1918, a "theatrical season" concededly meaning from October to June.

Applying fundamental principles to the construction of this contract, it is entirely clear that

Opinion.

the parties intended that defendant should have 463 all the rights mentioned for all time and that paragraph "Third" (particularly when illuminated by paragraph "Fifth"), as aptly put by counsel for defendant, is a statement of the least that defendant is to do, not of the most he is to have. Had the parties otherwise intended, they could readily have fixed a time limit in paragraph "First" by the addition of words such as "for (blank) years from" or "until" a stated date. The provision in paragraph "Eleventh" merely expressed, *inter alia*, the natural precaution of the playwright in preventing the disposition of the play to persons or corporations who might be distasteful or otherwise not satisfactory to the playwright. Whatever may be said as to paragraphs "Eleventh" and "Sixth" and the addendum, is now academic, in view of paragraphs "Third," "Fourth" and "Eleventh" of the second contract.

464

Indeed, the first contract in this respect was an entirely normal arrangement which contemplated full right to defendant to produce the play as long as he deemed proper, provided that he would, in any event, give the play a fair trial and the opportunity for success which the minimum of seventy-five performances during the theatrical seasons, 465 covered by paragraph "Third" would develop.

2. I now come to what is the real controversy between the parties, viz: the motion picture rights. On this branch of the case, the question, simply stated, is whether the case at bar falls under *Frohman v. Fitch*, 164 App. Div. 231 or *Klein v. Beach*, 232 F. R. 240; 239 F. R. 109. In the former case the contract recited, "Whereas" Frohman "desires the exclusive right to produce or to have produced the said play" and provided that Fitch

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466 "does sell * * * to Frohman "the exclusive right to produce the said play." In the case at bar, the contract recites "Whereas" Morosco "wishes to obtain the exclusive right and license to produce, perform and represent the said play" and provides that Manners "does grant" to Morosco "the sole and exclusive license and liberty to produce, perform and represent said play."

467 It will thus be noted that the word "produce" occurs in both contracts, *i. e.*, in Frohman-Fitch and in Manners-Morosco. When used alone that word has a definite meaning, by virtue of *Kalem Co. v. Harper*, 222 U. S. 55 and *Frohman v. Fitch, supra*, as was pointed out by Judge Learned Hand in *Klein v. Beach, supra*. In other words, "produce" includes the presentation in or by way of motion pictures. The scope of the word, as thus judicially defined, can be narrowed only by some other language, employed by contracting parties to express a different intent. Thus, it was that the question in *Klein v. Beach, supra*, was whether the additional words "for presentation on the stage" and "on the stage" construed with their context, meant the spoken play.

468 Of course, it is often possible to find in the opinions of courts, some sentence or phrase which, if isolated from its context, may convey a meaning different from what the writer intended. Opinions, however, must be read as a whole and illustrative observations must be understood as applying only to the question and facts under consideration. Thus read, it will be found that the opinion of each court in *Klein v. Beach, supra*, simply held that the particular contract there considered contemplated the spoken play only.

In the case at bar, however, the decision need not rest solely upon particular words found in

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particular paragraphs. The whole structure of 469 the contract demonstrates plainly the strength of defendant's position.

When the first contract was executed, motion pictures, as the parties agree and as the testimony shows, were well known. It is not controverted in this case that a motion picture of "Peg O' My Heart" would seriously damage, from a financial standpoint, the production of the spoken play. It is difficult to suppose that Morosco, as a producing manager, would risk the money necessary to produce the play at least seventy-five times each year for several years and leave the motion picture rights outstanding in Manners. In such a situation Manners might, at any time, for some reason satisfactory to himself, sell the motion picture rights and destroy the financial value of the spoken play. Indeed, the Second contract discloses that controversies arose between the parties.

It might very well have happened that the play, instead of turning out a great success, might have had a run of short duration with consequent lean royalties. Yet the production might have been saleable for motion pictures at a price in excess of any royalties which failure as a spoken play would indicate. In such circumstances, Manners could not lose. He would have, for himself, the proceeds resulting from his ownership of the motion picture rights, while Morosco would be compelled to pay him the stipulated percent of gross (not net) receipts derived from the compulsory performances required by paragraph "Third" and contemporaneously the financial results to Morosco might be gravely affected by the contemporaneous motion picture. In other words, Manners could not lose and Morosco was sure to lose, and practically the same result would follow if the play were released

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472 for stock. Courts are not astute to construe contracts with such a result unless the language and intent clearly so require.

Per contra, if Morosco, by the contract, gained the motion picture rights, it is hardly conceivable that, while the spoken play was a success, he would destroy its financial future and possibilities by producing motion pictures contemporaneously and thus destructively compete with himself.

473

Finally, that it was not intended to limit the scope of the production to any field of presentation, is well evidenced by paragraph "Tenth" of the First Contract. The express exclusion of the right to print and publish the play is clearly expressive of the intent to include all rights except those specifically excluded or reserved.

The suggestion that paragraph "Seventh" has any bearing upon the question of motion picture rights, is not persuasive, in view of the *Kalem* and *Frohman v. Fitch* cases.

The bill is dismissed with costs.

November 29, 1918.

474

District Judge.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1918.

No. 201.

Argued March 14, 1919; Decided April 16, 1919.

J. HARTLEY MANNERS, Plaintiff-Appellant,

v.

OLIVER MOROSCO, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Hough, and Manton, Circuit Judges.

Appeal from the District Court for the Southern District of New York. Suit in Equity by J. Hartley Manners against Oliver Morosco. Decree Dismissing the Bill. Plaintiff appeals.

Walter C. Noyes, David Gerber, Counsel for Appellant.

William Klein, Charles H. Tuttle, Counsel for Appellee.

MANTON, C. J.:

The appellant is the author of "Peg O'My Heart." He is the husband of Laurette Taylor, the star of that very successful play as dramatized.

On January 19, 1912, the parties entered into a contract which in part provided and granted to the appellee "the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada." The third paragraph provided:

"The party of the second part (appellee) agrees to produce the play not later than July 1, 1913, and to continue the said play for at least 75 performances during the season of 1913-1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides:

"That the said party of the second part (appellee) further agrees that if during any one theatrical year, such year to begin on the first day of October, said play has not been produced or presented for 75 performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part."

After the contract was made, the play was produced and ran continuously and successfully for a period of seventy-four weeks up to May 30, 1914, in New York, with Laurette Taylor in the star part. On July 20, 1914, the parties entered into an agreement modifying in some respects the agreement of January 19, 1912. By the modi-

fication, arrangement was made for the production of the play without Laurette Taylor in the star part and for other productions in more than one company. It was further provided that the appellee be permitted to lease, stipulate, assign, transfer or sell to any one, any of his rights under either contract. And it was specifically covenanted that the issue now presented between the parties as to the ownership of motion picture rights was to be determined by reference to the original contract. After the execution of this contract, a number of companies gave performances in various parts of the United States and Canada. Payment under the terms of the contract was duly made to the appellant.

When the theatrical season of 1917-1918 expired, the appellant, claiming that the appellee no longer had any interest in any of the producing rights, brought this action to restrain further production of the play by the appellee, both on the stage and in motion picture form. Two questions are presented by counsel on this appeal. First, the date, if any, of the termination of the contract, and, second, whether the appellee under the contract is entitled to the motion picture rights.

It is claimed by the appellant that only a license, revocable at his option, was contracted for with the appellee under the third paragraph of the first contract, and that the contract expired at the end of the theatrical season in May, 1918. But that is not what was contracted for. It was not an agreement for personal service or for a mere license, but was a bargain and sale of the sole and exclusive right to produce, perform and represent the said play in the United States and Canada. Property was thereby granted and conveyed. It may be intangible, but it has a value and is the subject of proprietorship. It is not a conveyance which is recoverable at will or for a temporary period, but for the time provided for in the terms of the contract.

The third paragraph is a covenant setting forth the least that the appellee would do in performing the contract. In other words, it sets forth the appellee's assurance of his bona fide endeavor or attempt to make the play a success and thus secure to the appellant some substantial royalties. A mere reading of the paragraph will indicate that the parties fixed a minimum and not a maximum of endeavor on the part of the appellee to make for success. It is not an agreement of the most that the appellee agreed to do to make for success. In this connection, the fifth paragraph must be considered and read with the third paragraph. Plainly, if the appellee had failed to present seventy-five performances of the play "during any one theatrical year," then all rights of the appellee ceased and determined and the play reverted to the appellant. There is harmony between the first and third paragraphs and the intent of the parties that the appellee's rights should not be limited to any definite period is quite plain. The grant was perpetual if the obligations of the contract, particularly paragraphs three and five, were complied with.

The modified contract made on July 20, 1914, reaffirmed the first contract and provided in the ninth paragraph that at least four years after its date, the original contract was still in force, as a con-

yance of all the production rights, and that neither party would produce the play in motion picture form without the consent of the other and until such time, when, after the expiration of four years, the question of motion picture rights should be determined pursuant to the terms of the original agreement.

This clearly negatives the claim of the appellant that under the third paragraph, the contract expired after five years from January 1, 1912. An agreement for production rights binding the parties' heirs, executors, assignees, administrators and successors, is an assignment and not a mere license (*Photodrama Motion Picture Co. vs. Film Corp.*, 213 Fed. Rep., 374; *aff'd 220 Fed. Rep.*, 448).

Since the contract is not revocable by will by either party or otherwise limited as to its duration by its express terms or by the inherent nature of the contract itself with reference to its subject matter, it is presumably intended to be permanent or perpetual in the obligation it imposes (*Western Union Telegraph Co. vs. Penn. Co.*, 129 Fed. Rep., 849).

In determining the production rights conveyed, whether it included the right to produce in motion picture form or not, we must confine our study to the contract itself. The intention of the parties must be secured from the language employed in the instrument itself. Such intention means the accepted reasonable and judicial settled content of the words employed. If the parties have erred in the use of the words, this kind of action can not grant relief. The words employed "the sole and exclusive license and liberty to produce, perform and represent the said play" has received judicial construction. A motion picture performance is a stage representation of the play and violative of the rights of an owner of the exclusive right of production (*Frohman vs. Fitch*, 164 App. Div., 231).

Ordinarily one may "produce or perform" a spoken play upon the stage but "to represent" seems to be peculiarly appropriate to a motion picture representation of a play. Dramatic rights were held to include the motion picture rights in *Frohman vs. Fitch* (*supra*), in the absence of other words narrowing the meaning of the contract. An author of dramatic composition is protected by §4952 of the Revised Statutes of the United States as to not only the sole right of printing it, but also the sole right of "publishing, performing or representing it or causing it to be performed or represented by others." Nor need we be confined in our determination to a strict legal use of the words employed as heretofore judicially determined. It is apparent that the parties intended the results here pronounced. We think the parties intended a conveyance of the entire right to place the play before the American public in any form. It seems inconceivable that the parties intended to reserve to the appellant the right of production in motion picture form when they gave no such expression of reservation in the language of the contract, and particularly when the language employed indicated a comprehensive grant of all producing rights.

In paragraph Ten of the first contract, the author reserved the right to print and publish the play, but his right was not to be exercised within six months after the production of such play in New

York City unless by written consent of the manager. So, too, reservations were made as to leasing and sub-letting the play. By the tenth paragraph, the author reserved the right of publication in book form.

An expression in the contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed (13 *Corpus Juris*, 537).

In view of what appears in this record of the cost and expense of successfully dramatizing this play and what appears to be a lucrative contract resulting to the appellant, this court should be reluctant to give a construction not warranted by the language nor intended by the parties, which would permit of competition by the appellant in the production of this play in motion pictures (Frohman vs. Fitch, 164 App. Div., 231).

Appellant, however, says that Klein vs. Beach (239 Fed. Rep., 108) supports his views. In that case, it was recited, "whereas the manager wishes to engage the services of the author to dramatize the said book for presentation on the stage" and the novelist granted to the author "the sole and exclusive right to dramatize the said book for presentation on the stage," and the parties agreed to grant to the manager "the sole and exclusive license and liberty to produce, perform and represent the said play or dramatic composition on the stage" the right to dramatize the novel for presentation on the stage was held not to carry the right to produce in motion pictures. This court, in considering Klein vs. Beach, *supra*, said: "the turning point in this case is the scope of the grant whether by its terms it conferred upon Klein the dramatic rights in the larger sense including presentation not only by living actors, but also by motion pictures or whether it was limited to the stage proper." This court approved Frohman vs. Fitch, *supra*, and upon the authority of Kalen vs. Harper (222 U. S., 55) stated that the dramatic rights included motion picture rights, but such a conveyance of dramatic rights to have such meaning, cannot be narrowed by other limitations. In Klein vs. Beach, *supra*, stage rights only were granted, and this was made plain in the preamble and the provisions of the contract. This court there said in so holding: "In general it is quite clear that this was the prevailing purpose of the parties."

In the case at bar, no distinction is made between the producing rights which the appellant had and those which he conveyed, except where the parties themselves defined it, such as in paragraph Tenth, to wit, reserving the right to publish the play in book form under conditions there expressed.

We find no error in excluding the contract with Laurette Taylor. This was a contract for the services of Laurette Taylor to perform as a leading female character, not only in this play, but in other plays that might be suited to her talent and ability. It provided for a three year period with an option of three more. It was no evidence indicating a limitation upon the contract between the parties to this litigation and was properly excluded.

The identity of the person who drew the agreement of January 19, 1912 was unimportant. The contract was bilateral. Responsibility

for ambiguity in a contract should be borne by the party who caused it, but there is no ambiguity. It was not important to know the identity of the party who drew the contract.

Holding these views as we do, the decree must be affirmed.

United States Circuit Court of Appeals for the Second Circuit,
October Term, 1918.

No. 201.

J. HARTLEY MANNERS, Plaintiff-Appellant,

against

OLIVER MOROSCO, Defendant-Appellee.

Argued March 14, 1919; Decided April 16, 1919.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward, Hough, and Manton, Circuit Judges.

WARD, *Circuit Judge* (dissenting in part):

The grant in the contract under consideration is of an exclusive right "to produce, perform and represent" a play. There has been no judicial construction of any of these words so as to make them technical without reference to the terms of some particular contract. *Harper Bros. vs. Kalem Co.*, 169 Fed. Rep. 61; 222 U. S., 55, was not a case of contract but of infringement of copyright, the question being whether a moving picture show was a dramatization of an author's work. In *Frohman vs. Beach*, 164 App. Div. 231, the exclusive right to "produce" a play was construed in the particular contract to cover moving picture rights, whereas in *Klein vs. Beach*, 239 Fed. Rep. 108, we held the grant of an exclusive right to "produce, perform and represent" a play "on the stage" did not cover moving picture rights. The other words "perform and represent" in that contract and in the contract now under consideration have appeared in our Copyright Act since 1870, U. S. Rev. Stat. 4966, long before moving picture shows were dreamed of. Therefore the question is when the parties used the words "produce, perform and represent" the play what were they intending to cover by those words? It seems to me perfectly plain from the contract that they were intending to cover the spoken play only and if so, the words they used, however large, must be confined to the thing they were contracting about.

The third article of the contract speaks of theatrical seasons, which exist for spoken and do not exist for movie plays.

The fourth article provides for royalties on the gross weekly receipts of the box office, which was held in *Harper Bros. vs. Klaw*, 232 Fed. 609, 612, to be inapplicable to "any method of photoplays

in commercial use or known to witnesses or counsel." The trial judge refused to permit the plaintiff, over his objection and exception, to prove this fact.

The fifth article refers again to theatrical seasons.

The sixth article provides for the production of the play in first class theatres and on the road with Miss Taylor in the title role, which applies in my judgment to the spoken play only.

The eighth article provides that the rehearsals and productions should be under the author's direction, which does not apply to movie shows.

The eleventh article provides that should the play fail in New York or on the road it should be released to stock theatres, which applies to the spoken play only.

On the other hand, I find not a word in the contract indicating an intention to transfer the movie rights though they were perfectly well known by both parties. Therefore though the words of the grant are large enough to cover them, I think the words are to be restricted to what the parties were contracting about, viz., the spoken play.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court-rooms, in the Post-Office Building, in the City of New York, on the 26th day of April, one thousand nine hundred and nineteen.

Present:

Hon. Henry G. Ward,
Hon. Charles M. Hough,
Hon. Martin T. Manton,
Circuit Judges.

J. HARTLEY MANNERS, Plaintiff-Appellant,

v.

OLIVER MOROSCO, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. J. H. Manners v. Oliver Moroseo. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1919. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 169 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of J. Hartley Manners against Oliver Moroseo, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the second Circuit, this 5th day of May in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the said United States the One Hundred and forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which J. Hartley Manners is appellant, and Oliver Moroseo is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eleventh day of June, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,117. Supreme Court of the United States, October Term, 1918. No. 1031. J. Hartley Manners vs. Oliver Morosco. Writ of Certiorari. Copy rec'd 6/13/19 by William Klein, Atty. for Def.; Charles H. Tuttle, Counsel for Deft.

In the Supreme Court of the United States, October Term, 1919.

J. HARTLEY MANNERS, Petitioner,

v.

OLIVER MOROSCO.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

WALTER C. NOYES,
DAVID GERBER,
WM. J. HUGHES,
Counsel for Petitioner.
WM. F. DAY,
CHARLES H. TUTTLE,
Counsel for Respondent.

To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York, June 18th, 1919.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

[Endorsed:] 370, '19—27117. United States Circuit Court of Appeals, Second Circuit. J. Hartley Manners v. Oliver Morosco. Return to Certiorari.

[Endorsed:] File No. 27117. Supreme Court U. S., October Term, 1918. Term No. 1031. J. Hartley Manners, petitioner, vs. Oliver Morosco. Writ of certiorari and return. Filed July 3, 1919.